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No. 14883

**United States
Court of Appeals**
for the Ninth Circuit

LEON D. URBAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 336)

**Appeal from the District Court
for the District of Alaska,
Fourth Division.**

FILED

MAR -2 1956

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.-2-20-56

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Box 111, Fairbanks, Alaska,

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JULIEN A. HURLEY,

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WARREN A. TAYLOR,

P. O. Box 200,

Fairbanks, Alaska,

Attorneys for Appellant.

**In The District Court for The District of Alaska
Fourth Judicial Division**

No. 2020Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEON D. URBAN,

Defendant.

INDICTMENT

Murder in the First Degree

The Grand Jury charges in this Indictment:

That Leon D. Urban, on or about the 31st day of January, 1955, in the Fourth Judicial Division, District of Alaska, then and there being, feloniously killed another, to wit, Myrtle Patricia Cathey, by the said Leon D. Urban having, on or about the 22nd day of January, 1955, purposely, and with deliberate and premeditated malice, feloniously assaulted Myrtle Patricia Cathey by beating her with his fists and other objects, the exact description of which are unknown, in violation of Section 65-4-1, of the Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 7th day of March, 1955.

A True Bill.

/s/ W. L. LHAMON,

Foreman of the Grand Jury.

/s/ THEODORE F. STEVENS,

United States Attorney.

Witnesses before the Grand Jury:

Maybell Bray,
Sherrie Renae Yendes,
William B. DeWalt,
Dr. Harvey W. Anderson,
Mary Elizabeth Ross,
Donald Byrum,
Claude Victor Anderson,
Patricia Surber,
Eric Campbell McKenna,
George E. Haritos,
Marvin Thomas Jennings,
Frank Myers,
James J. Goodfellow,
William W. Trafton,
Ben McFarland,
Wallace Cathcart,
Rosella McGraw,
Theodore V. Beaseley,
James J. Murray,
Kathleen Coffin,
Francis Wirth,
Oscar W. Pederson.

Presented to the Court by the Foreman of the
Grand Jury, in open Court, in the presence of the
Grand Jury and:

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

VERDICT No. III

We, the Jury, duly impaneled and sworn to try the above entitled cause do find the defendant not guilty of murder in the first degree, not guilty of murder in the second degree, but guilty of manslaughter.

Dated at Fairbanks, Alaska, this 26th day of May, 1955.

/s/ JOCKES L. BAKER,
Foreman.

[Endorsed]: Filed and entered May 26, 1955

[Title of District Court and Cause.]

SENTENCE

The Government was represented by Theodore F. Stevens, United States Attorney; the defendant was present in person and represented by Warren A. Taylor.

This being the time set for the passing of sentence, Mr. Stevens presented a statement to the Court; Mr. Taylor presented a statement to the Court; Mr. Urban presented a statement to the Court.

It was the Sentence of the Court that the defendant be committed to the custody of the Attorney General of the United States or his authorized agent for the period of Twenty (20) years.

It was Ordered that the bond of \$15,000.00 presently in force be continued until 11:00 a.m., Thurs-

day, June 23, 1955, and that a Hearing be had at that time as to whether bail shall issue pending appeal.

Entered June 21, 1955.

In the District Court for the District of Alaska
Fourth Judicial Division

No. 2020 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEON D. URBAN,

Defendant.

JUDGMENT AND COMMITMENT

On this 21st day of June, 1955, came the attorney for the Government and the defendant appeared in person and by counsel.

It is adjudged that the defendant, having been tried for the crime of Murder in the First Degree, as charged in the Indictment on file herein, and having pled not guilty thereto, has been convicted by a verdict of guilty of the offense of Manslaughter, which was then and there an included offense of the crime charged in said Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pro-

nounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of twenty (20) years, such sentence to commence on the 21st day of June, 1955.

It is ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the copy serve as the commitment of the defendant herein, and that said defendant pay the costs of this action in the sum of \$———, to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 22nd day of June, 1955.

/s/ VERNON D. FORBES,
District Judge.

The Court recommends commitment to the Attorney General.

/s/ JOHN B. HALL,
Clerk.

[Endorsed]: Filed and entered June 22, 1955.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
AND ORDER EXTENDING TIME TO
FILE RECORD AND DOCKET TRAN-
SCRIPT

United States of America
Territory of Alaska—ss.

Mary F. Templeton, being first duly sworn, upon oath, deposes and says:

That I am the Official Court Reporter of the Fourth Division of the Territory of Alaska and reported the testimony in the above-entitled criminal action, and I have been unable to complete transcribing the testimony and said action, so that the transcript of the same cannot be filed within the time allowed by order of Court, but believe that I can complete the same so that the transcript can be filed before the 26th day of September, 1955.

/s/ MARY F. TEMPLETON.

Subscribed and sworn to before me this 31st day of August, 1955.

[Seal] /s/ JULIEN A. HURLEY,
Notary Public in and for the
Territory of Alaska.

My Commission expires June 12, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET TRANSCRIPT

On motion of attorneys for the above-named defendant, Leon D. Urban, for an order extending the time for filing, recording and docketing the transcript of the above-entitled case on appeal, and it appearing to the Court that by reason of the fact that the Court Reporter has been busy with other matters of the Court and has been unable to prepare and complete the transcript of the record, which is a very long record, and that it is impossible for the Clerk of the District Court to prepare and deliver said record on appeal, within the time allowed by the rules of Court, and the Court being duly advised in the premises and good cause appearing therefor,

It is hereby ordered that the time within which the record on appeal in the above-entitled case shall be deposited, filed and docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be and is hereby enlarged and extended to and including the 2nd day of September, 1955.

Dated at Fairbanks, Alaska, this 1st day of August, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered August 1, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET TRANSCRIPT

On motion of attorneys for the above-named defendant, Leon D. Urban, for an order extending the time for filing, recording and docketing the transcript of the above-entitled case on appeal, and it appearing to the Court that by reason of the fact that the Court Reporter has been busy with other matters of the Court and has been unable to prepare and complete the transcripts of the record, which is a very long record, and that it is impossible for the Clerk of the District Court to prepare and deliver said record on appeal, within the time allowed by the rules of Court, and the extension of time heretofore granted, and the Court being duly advised in the premises and good cause appearing therefor,

It is hereby ordered that the time within which the record on appeal in the above-entitled case shall be deposited, filed and docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be and is hereby enlarged and extended to and including the 26th day of September, 1955.

Dated at Fairbanks, Alaska, this 31st day of August, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered August 31, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Leon D. Urban, Fairbanks, Alaska, Defendant.

Julien A. Hurley and Warren A. Taylor, Fairbanks, Alaska, Attorneys for Defendant.

Offense: Murder in the first degree, in violation of Section 65-4-1, Alaska Compiled Laws Annotated, 1949.

Whereas, Leon D. Urban, the above-named defendant, was duly tried and by jury's verdict convicted of the crime of manslaughter, in violation of Section 65-4-4, Alaska Compiled Laws Annotated, 1949, and was sentenced by the above-entitled court on the 22nd day of June, 1955, to be confined in a prison to be designated by the Attorney General of the United States for a period of Twenty (20) years.

I, Leon D. Urban, the above-named defendant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated at Fairbanks, Alaska, this 24th day of June, 1955.

/s/ LEON D. URBAN,
Defendant.

/s/ JULIEN A. HURLEY,
/s/ WARREN A. TAYLOR,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL ON
ON ADMISSION TO BAIL

A Judgment having been entered on the 22nd day of June, 1955, in the above-entitled Court whereby the above-named defendant was convicted of the crime of manslaughter, in violation of Section 65-4-4, Alaska Compiled Laws Annotated, 1949, and was sentenced by the above-entitled court on the 22nd day of June, 1955, to be confined in the Federal penitentiary at a place to be designated by the Attorney General of the United States for a period of Twenty (20) years, and the said defendant, Leon D. Urban, having appealed from said Judgment and been duly admitted to bail in the sum of Fifteen Thousand Dollars (\$15,000.00),

We, Clarence Johnson, of Fairbanks, Alaska, a retired businessman, and Clifford J. Judd, of Fairbanks, Alaska, owner of rental properties and a bar, hereby undertake that the above-named defendant, Leon D. Urban, shall in all respects abide and perform the orders and judgments of the above-entitled court and of the appellate court upon the appeal, or if he fail to do so in any particular, that we will pay to the United States of America the sum of Fifteen Thousand Dollars (\$15,000.00) in which the defendant is admitted to bail.

/s/ LEON D. URBAN,
Principal.

/s/ CLARENCE JOHNSON,

/s/ CLIFFORD J. JUDD,

Sureties.

United States of America,

Territory of Alaska—ss.

Clarence Johnson and Clifford J. Judd, each being first duly sworn, upon oath deposes and says:

That I am not a counsel or attorney at law, marshal, clerk of any court or other officer of any court;

That I am worth the sum specified in the foregoing undertaking, to wit: The sum of Fifteen Thousand Dollars (\$15,000.00), exclusive of property exempt from execution and over and above all just debts and liabilities.

/s/ CLARENCE JOHNSON,

/s/ CLIFFORD J. JUDD.

Subscribed and sworn to before me this 24th day of June, 1955.

[Seal] /s/ OLGA T. STEGER,
Chief Deputy Clerk of the District Court, Fourth
Division, Territory of Alaska.

Approved:

/s/ VERNON D. FORBES,

District Judge.

Service of copy acknowledged.

[Endorsed]. Filed June 24, 1955.

[Title of District Court and Cause.]

ORDER ADMITTING DEFENDANT
TO BAIL

The Government was represented by Theodore F. Stevens, United States Attorney; the defendant was present in person and represented by Julian A. Hurley and Warren A. Taylor.

Mr. Hurley and Mr. Taylor presented argument to the Court on the matter of the right of bail by the defendant after conviction and sentence.

Mr. Stevens stated his views on the matter at hand. It was ordered that the defendant be admitted to bail pending appeal in the amount of \$15,000.00.

Entered June 23, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the above named defendant, by his attorneys, Taylor, Miller & Taylor, and moves this Honorable Court for an Order granting him a new trial for the following reasons, to wit:

1. That the Court erred in denying defendant's Motion for Acquittal of the charge of murder in the first degree made at the conclusion of the plaintiff's evidence.

2. That the Court erred in denying defendant's Motion for Acquittal of the charge of murder in the second degree, an included offense in said indictment, made at the conclusion of the plaintiff's evidence.

3. That the Court erred in denying defendant's Motion for Acquittal of the crime of manslaughter, an included offense, made at the conclusion of the plaintiff's evidence.

4. That the Court erred in denying defendant's Motion for Acquittal made at the conclusion of all of the evidence.

5. That the Court erred in denying defendant's Motion for Acquittal of the crime of murder in the second degree, an included offense, made at the conclusion of all the evidence.

6. That the Court erred in denying defendant's Motion for Acquittal of the crime of manslaughter, an included offense, made at the conclusion of all the evidence.

7. That the verdict is contrary to the weight of the evidence.

8. That the verdict is not supported by substantial evidence.

9. That the defendant was highly prejudiced and deprived of a fair trial by reason of the following circumstances: That the attorney for the Government stated in his argument to the jury that the District Judge had deprived him of the opportunity

of introducing hearsay testimony in evidence, and had allowed the defense attorneys to introduce such testimony in evidence; whereas the facts are that the Government's attorney did not object to such testimony and defense counsel did object to such testimony.

10. That the Court erred in allowing in evidence enlarged pictures of the body of deceased, Myrtle Cathey, which enlargements were distorted; that they were not true enlargements of the original contact prints, but were enlargements of only parts of original contact prints; that the enlargements were purposely printed on different paper for the purpose of accentuating and emphasizing certain contusions and lacerations on the body and face of deceased. That the said enlargements depicted the face of the deceased ten days after the alleged beating inflicted upon her and showed blood around the mouth of deceased which was caused by treatment of the hospital attendants. That all of such enlargements were introduced into evidence for the purpose of inflaming the minds of the jury and prejudicing the defendant. That the contact pictures were available and were in evidence and the introduction in evidence of enlargements which accentuated particularly gruesome features of the original pictures was highly prejudicial to defendant.

11. That the Court erred in refusing to instruct the jury regarding circumstantial evidence and the consideration of the same by the jury.

12. That the Court erred in overruling defendant's Motion to strike Plaintiff's Exhibits 1, 2, 3, 4, 5, and 6.

13. That the Court erred in refusing to give defendant's requested instructions Nos. 1, 2, 3, 4, 5, 6, 7, and 8.

14. That the Court erred in giving instruction No. 9, in that said instruction assumed facts not in evidence to constitute the crime of murder in the second degree, in that murder in the second degree can not be had upon testimony of a hitting with the hands alone, and there was no evidence of any weapon whatsoever being used by the assailant of the deceased.

That malice and intent, essential elements of murder in the second degree, cannot be presumed where attack was by hands alone.

15. That the Court erred in giving Instruction No. 10, upon the grounds that intent and malice cannot be presumed where death was caused by hitting with the fists.

16. That the Court erred in giving Instruction No. 11, upon the grounds that the Court failed to instruct the jury upon the elements of involuntary manslaughter or excusable homicide.

17. That the Court erred in giving Instruction No. 12, upon the grounds that the second paragraph thereof assumes that the defendant inflicted upon

the deceased injuries by means which were dangerous to life or calculated to destroy life; and also in the fourth paragraph, the Court erred in failing to instruct the jury that where there is a failure to give the required treatment to an injured person where such treatment would save the life of said injured person, such failure to treat the injured party was a contributing cause of death.

18. That the Court erred in giving Instruction No. 13, upon the grounds that the Court emphasized guilt and that in said instruction was there any instruction that the jury could acquit the defendant, but that in case of doubt, the doubt should be resolved in favor of guilt.

19. That the Court erred in giving Instruction No. 14, upon the grounds that the Indictment charging first degree murder was dismissed prior to submitting the case to the jury.

20. That the Court erred in giving Instruction No. 16, upon the grounds that a trivial slap a month before the alleged assault by the defendant would not have any probative value of intent of the crime charged in the Indictment, or included crimes therein.

21. That the Court erred in allowing the jury to separate and go to their respective homes for the night, upon the grounds that so many objections had been taken to the instructions of law by the Court by both the attorneys for the plaintiff and the defendant that the Court would unduly delay the

jury in the performance of its duty if it was required to rule upon the objections interposed by counsel for the respective sides. That the Court did on the following day overrule all objections taken by the attorneys for the plaintiff and the attorneys for the defendant and refused to give the requested instructions of the defendant but did give one instruction which defined homicide, to which no objection was taken.

Dated at Fairbanks, Alaska, this 1st day of June, 1955.

TAYLOR, MILLER & TAYLOR,
Attorneys for Defendant,

By /s/ WARREN A. TAYLOR,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause.]

HEARING RE MOTION FOR NEW TRIAL

The Government was represented by Theodore F. Stevens, United States Attorney, and George M. Yeager, Assistant United States Attorney. The defendant was present in person and represented by Warren A. Taylor.

Mr. Taylor presented argument on his Motion for a New Trial; Mr. Stevens, presented his argument to the Court resisting the Motion.

It was the Order that this motion for a New Trial be denied and the time for the passing of sentence was set for Friday, June 17, at 4:30 p.m.

Entered June 14, 1955.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

Defendant's Requested Instruction No. One

You are instructed that malice may never be implied from the use of bare fists.

Hill vs. People

1 Colo. 436

Kent vs. People

8 Colo. 563

U.S. vs. King

34 Fed. 302,311.

Refused.

/s/ VERNON D. FORBES,
Judge.

Defendant's Requested Instruction No. Two

You are further instructed that where death unintentionally ensues from acts or means which,

under the circumstances, could not have been supposed to injure human life or inflict great bodily injury, the law will not imply malice and the degree of the crime will be reduced from murder to manslaughter.

People vs. Munn,
65 Cal. 211, 3 Pack 650.

Refused.

/s/ VERNON D. FORBES,
Judge.

Defendant's Requested Instruction No. 3

You are further instructed that malice aforethought, whether express or implied, must appear from the evidence in order to warrant a conviction for murder in any degree.

Babcock vs. People,
13 Colo. 524, 22 Pac. 817.

Refused.

/s/ VERNON D. FORBES,
Judge.

Defendant's Requested Instruction No. Four

You are further instructed that if the instrument was not likely to produce death, it was not to be presumed that death was designed unless from the manner in which the instrument was used, such intention evidently appears.

Washington vs. State,
110 S.W. 751, 13 R.C.L. Sec. 48.

Refused.

/s/ VERNON D. FORBES,
Judge.

Defendant's Requested Instruction No. Five

You are further instructed that a blow struck with the fist is not such an unlawful act as in its consequences would naturally tend to destroy the life of a human being under any conditions reasonably to be anticipated.

People vs. Mighell,
254 Ill. 53, 98 N.E. 236.

People vs. Lurie,
276 Ill. 630, 115 N.E. 130.

Refused.

/s/ VERNON D. FORBES,
Judge.

Defendant's Requested Instruction No. Six

You are further instructed that the jury must find that the defendant did purposely, and of deliberate and premeditated malice, assault Myrtle Cathey with the intent to kill her in order to find the defendant guilty of first degree murder.

That the defendant, at the time of the assault, must have intended the death of his victim before a

verdict of first degree murder can be returned in this case.

Refused as included.

/s/ VERNON D. FORBES,
Judge.

Defendant's Requested Instruction No. Seven

You are further instructed that the defendant must have committed such an assault upon the deceased that it would have caused her death, and at the time of the assault it must have been done purposely and maliciously with an intent to kill, before the jury could return a verdict of guilty in the second degree.

Refused as included.

/s/ VERNON D. FORBES,
Judge.

Defendant's Requested Instruction No. Eight

You are further instructed that in this case, the evidence is that the assault, if any, was by use of defendant's fists. The law will not imply malice or intent because ordinarily death would not be caused by the use of such means.

Malice and intent cannot be implied where the homicide is committed by means not likely to produce death.

Commonwealth vs. Fox,
7 Gray 585.

People vs. Mighell,
98 N.E. 236.

People vs. Lurie
115 N.E. 130.

People vs. Pilweski,
128 N.E. 801.

Crenshaw vs. People,
131 N.E. 576 & 15 A.L.R. 521.

Refused.

/s/ VERNON D. FORBES,
Judge.

In the District Court for the District of Alaska
Fourth Judicial Division
No. 2020 Cr.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
LEON D. URBAN,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

THEODORE F. STEVENS,
United States Attorney, and

PHILIP W. MORGAN,
Assistant U. S. Attorney, Attorneys for
Plaintiff.

WARREN A. TAYLOR and
EUGENE V. MILLER,
Attorneys for Defendant.

Before: Hon. Vernon D. Forbes,
District Judge and Jury.

May 16, 1955—10:00 A.M.

Be it Remembered, that at 10:00 a.m., upon the 16th day of May, 1955, the trial of this cause, No. 2020 criminal, was begun, plaintiff and defendant represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Will the Clerk, please, call the venire, first, second, third and fourth?

The Clerk: Your Honor, we have seventy jurors present and we have eight that are not here, sir.

The Court: Leon D. Urban is present in Court?

Mr. Taylor: Yes, your Honor.

The Court: With his counsel, Mr. Taylor and Mr. Miller.

Mr. Taylor: Yes, sir.

The Court: And you are ready to proceed in criminal case United States of America versus Leon D. Urban, 2020?

Mr. Taylor: The defendant is ready, your Honor.

The Court: The government ready?

Mr. Stevens: The government is ready, your Honor.

The Court: Very well. The Clerk will proceed to draw twelve names.

(At this time, Mr. Stevens made a brief statement to the veniremen and Mr. Taylor and Mr. Stevens proceeded to impanel a jury.)

The Court: Members of the jury, it is now after five o'clock and the jury to try this case has not yet been selected and it will be necessary to continue tomorrow. While [2*] you have not yet been selected I nevertheless admonish all of you jurors not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject matter of the trial; do not form or express any opinion until the case is finally submitted. And you will all, please, return at ten o'clock tomorrow morning.

The Clerk: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 5:10 p.m., the trial of this cause was adjourned until May 17, 1955, at 10:00 a.m.)

May 17, 1955—10:00 A.M.

Be it Remembered, that upon the 17th day of May, 1955, at the hour of 10 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Clerk: Court has reconvened.

The Court: Let the record show the presence

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

of the defendant, Mr. Urban, and his counsel and Mr. Stevens, the government attorney. Will the Clerk, please, call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, sir. [3]

(Thereupon, Mr. Taylor and Mr. Stevens continued to impanel a jury.)

(A jury was duly impaneled and sworn to try the above named cause.)

The Court: At this time I believe the Clerk might discharge the other jurors who are not in service in this case.

The Clerk: The jurors who are not sitting on this case are excused until next Monday morning at 10 o'clock and you will, please, leave the courtroom and not enter during the trial.

The Court: It is now ten minutes past eleven. After a brief recess will the government be ready to proceed?

Mr. Stevens: The government will be ready to proceed with an opening statement. However, our first witness, the Doctor, is in surgery and has informed us he will not be able to be here until this afternoon. If the Court and counsel would be willing we would be willing to adjourn until two. However, we will make our opening statement before that also if the Court desires.

The Court: What does the defendant prefer under the circumstances?

Mr. Taylor: I believe it would be advisable to make the opening statement now, your Honor.

Mr. Stevens: May we just make the opening statement and then we will adjourn until two.

The Court: Is that satisfactory, Mr. Taylor? [4]

Mr. Taylor: That's right, yeah.

The Court: Very well. You may proceed.

(Thereupon, Mr. Stevens presented his opening statement to the jury.)

Mr. Miller: If the Court please, we will reserve our statement at this time.

The Court: Very well. The Court at this time wishes to order the Marshal to get in touch with Kenneth E. Brown, the juror, and instead of having him brought here I ask that the Marshal determine his excuse for non-presence this morning, and now, members of the jury, it is unnecessary for me to inform you of the importance of the case now before you. And I admonish you that it is your duty not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject matter of this trial; and of course, do not form or express any opinion until the case is finally submitted to you. You are now excused until two o'clock.

The Clerk: The Court is recessed until two o'clock.

(Thereupon, at 11:30 a.m., the trial of this cause was recessed until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the [5] defendant and his attorney. Will the Clerk call the roll of the jury?

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Very well. Are you ready to proceed, gentlemen?

Mr. Taylor: Defendant is ready, your Honor.

Mr. Stevens: The government is ready, your Honor. However, we must apologize to the Court and the jury and counsel again. The Doctor is still busy. He had a complication on the birth of a child, I guess. We would ask to put on our second witness out of order.

Mr. Taylor: No objection.

The Court: You may proceed.

Mr. Stevens: Call Mr. Goodfellow. The government would also ask permission to limit Mr. Goodfellow's testimony to the identification of some pictures at this time. He, his other testimony follows in natural sequence later in the trial. This is out of order. We would like to have these identified now while we are waiting for the Doctor.

The Court: Very well.

JAMES J. GOODFELLOW

a witness called in behalf of the plaintiff, was duly sworn and testified as follows: [6]

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. James J. Goodfellow.

Q. What is your occupation, Mr. Goodfellow?

A. Territorial Police Officer.

Q. How long have you been a Territorial Police Officer? A. Since August 1st of 1952.

Q. And where are you stationed?

A. Fairbanks.

Q. Fairbanks where? A. Alaska.

The Clerk: Government's Identification No. 1.

(Enlarged picture of portion of body of deceased was marked Government's Identification No. 1.)

Q. (By Mr. Stevens): Were you a patrolman for the Territorial Police here in Fairbanks on the 31st day of January, 1955? A. Yes, sir.

Q. On that day were you called to participate in any investigation? A. I was.

The Clerk: Government's Identification No. 2.

(Enlarged picture of portion of body of deceased was marked Government's Identification No. 2.) [7]

Q. (By Mr. Stevens): And in connection with

(Testimony of James J. Goodfellow.)

that investigation did you come in contact with a person known as Myrtle Patricia Cathey?

A. Yes, sir.

Q. And where was that that you came in contact with that person?

A. The Fairbanks Funeral Home.

Q. Do you remember the time of day?

A. Yes, sir.

Q. When was it?

A. Approximately three-thirty a.m.

The Clerk: Government's Identification No. 3.

(Enlarged picture of portion of body of deceased was marked Government's Identification No. 3.)

Q. (By Mr. Stevens): And what did you do at the funeral home, if anything, in connection with that investigation?

A. I took six photographs of the body.

The Clerk: Government's Identification No. 4; Government's Identification No. 5; Government's Identification No. 6.

(Enlarged pictures of portions of body of deceased were marked Government's Identification Nos. 4, 5, and 6, respectively.)

Mr. Miller: If the Court please, at this time we [8] would like to invoke the rule of excluding the witnesses.

Mr. Stevens: We have no objection, your Honor.

The Court: At this time it is the order of the

(Testimony of James J. Goodfellow.)

Court that any person who is in this room who is likely to give testimony in this case shall immediately remove from the room and stay absent except when giving testimony, so if there are any of you who expect to be called as a witness in this case will you, please, leave the room.

Q. (By Mr. Stevens): You stated you took six photographs? A. Yes.

Q. This is Government's Identification 3; can you identify that for us? Please don't turn it around.

A. This is an enlargement of the face of the body that I photographed at the funeral home.

Q. Does that picture fairly represent the face of the individual you saw at the funeral home?

A. Yes, sir.

Q. Do you know who made the enlargement?

A. Mr. Douthit of the News-Miner.

Q. And you took the picture personally?

A. Yes, sir.

Q. This is Government's Identification 2; can you identify that for us?

A. That is an enlargement of the photograph I took showing the left side and back of the body. [9]

Q. Who is the individual in the picture?

A. It is Mr. Thomas, the owner of the funeral home.

Q. And did you also take that picture?

A. Yes, sir.

Q. Does that picture fairly represent the body as you saw it in the funeral home?

A. It does.

(Testimony of James J. Goodfellow.)

Q. And that was on the 31st day of January?

A. It was.

Q. Of this year? A. Yes, sir.

Q. This is Government's Identification 1; could you tell us what that is, please?

A. That is an enlargement of the photograph I took showing the left ear and the side of the head of the body at the funeral home.

Q. You took the original picture, did you?

A. Yes, sir.

Q. And do you know who made the enlargement of this one?

A. Mr. Douthit of the News-Miner.

Q. Did Mr. Douthit make all of these enlargements? A. Yes, sir.

Q. Does that picture fairly represent the portion of the body you saw in the home that morning?

A. Yes, sir.

Q. This is Government's Identification 4; would you tell [10] us what that is, please?

A. It is an enlargement of the upper portion of the body at the funeral home from the right side that I took there.

Q. Now, there is an additional piece of paper on that; do you know who placed that on there?

A. Yes, sir.

Q. Who did? A. I did.

Q. And does the picture there fairly represent the condition of the body as you saw it at that time?

A. It does.

Q. Mr. Douthit also made this enlargement?

(Testimony of James J. Goodfellow.)

A. Yes, sir.

Q. This is Government's Identification 5; would you tell us what that is, please?

A. This is a full length photo or enlargement of a photo that I took of the body at the funeral home from the left side.

Q. Does that fairly represent the condition of that side of the body that you took the picture of?

A. It does.

Q. And Mr. Douthit also made the enlargement of this? A. He did.

Q. Is there an additional piece of paper on this Government's Identification 5 also?

A. There is. [11]

Q. And who placed that there? A. I did.

Q. This is Government's Identification 6; will you tell us what that is, please?

A. That is an enlargement of a photograph showing the lower legs of the body that I photographed at the funeral home that morning.

Q. And does that fairly represent the condition of the legs as you saw them that morning?

A. It does.

Q. Mr. Douthit make the enlargement of this picture also? A. Yes, sir.

Q. What type of camera did you use?

A. It is a four by five graflex.

Q. Whose camera is that?

A. It is Territorial Police property.

Q. Have you taken other pictures for the Territorial Police? A. I have.

(Testimony of James J. Goodfellow.)

Q. Did you take these pictures as part of your official duties? A. I did.

Q. You have examined each one of the six identifications? A. I have.

Q. Due to the enlargement is there any distortion of any portion of that body? [12]

A. No, sir.

Q. Have you compared them with the original photographs? A. I have.

Q. What size print does the camera take, Mr. Goodfellow?

A. It is a four by five, four inches by five inches.

Q. What size were the original pictures that you had developed?

A. Four inches by five inches.

The Clerk: Government's Identification No. 7, (1 to 6.)

Mr. Taylor: What was that?

The Clerk: No. 7.

(Six (6) contact prints of mentioned enlargements were marked Government's Identification No. 7 (1 to 6 inclusive).)

Q. (By Mr. Stevens): This is Government's Identification 7, Mr. Goodfellow. Will you identify those for us, please?

A. These are contact prints from the negatives of the film that I exposed that morning.

Q. Are those the same prints of the first six identifications here? A. Yes, sir.

(Testimony of James J. Goodfellow.)

Q. And those are the contact prints of the pictures you took on the morning of the 31st of January, 1955? A. They are. [13]

Mr. Stevens: With the understanding, your Honor, if the Court will allow us to have such an understanding that we can go further on direct examination at the proper time of Mr. Goodfellow, we will have——

The Court: Yes, that is what I understood when you called him out of turn.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: We will waive cross-examination at this time, your Honor.

The Court: Very well, that is all, Mr. Goodfellow, at this time. I understand you will be recalled.

(Witness excused.)

Mr. Stevens: See if Doctor Anderson is there yet, please. With the Court's permission, again then we wish to call another witness out of turn. The Doctor is still not here. We believe it would be best to wait for the Doctor, but if the Court wishes to continue.

The Court: I am wondering about that and I think that the Court and the jury understands that if the Doctor is in surgery it is impossible for him to leave to come to the court room to testify.

Mr. Stevens: That is my understanding, your Honor.

The Court: With that understanding, I don't

believe I should require the government to go ahead with the witnesses out of turn. I wish we did know how soon the Doctor might be expected. [14]

Mr. Stevens: Mr. Morgan said that he informed my office that it would be no longer than half an hour. That was a few minutes ago. I believe perhaps a twenty minute recess might do it. We will send someone over to bring the Doctor when he is through.

The Court: The defendant have any objection to a twenty minute recess?

Mr. Taylor: No objection, your Honor.

The Court: Very well. Members of the jury, once more it is my duty to admonish you that it is your duty not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; and, of course, do not form or express any opinion until the case is finally submitted to you. We will take a twenty minute recess.

The Clerk: Court is recessed until a quarter till three.

(Thereupon, at 2:25 p.m., the Court took a recess until 2:45 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his attorneys, and Mr. Stevens, the government attorney. You gentlemen wish to waive as to the jury?

Mr. Taylor: We will stipulate that they are all [15] present in the box, your Honor.

Mr. Stevens: The government so stipulates.

The Court: Very well.

Mr. Stevens: Call Doctor Anderson.

DR. HARVEY W. ANDERSON

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Harvey W. Anderson.

Q. Where do you reside, Dr. Anderson?

A. 1023-8th.

Q. I was a little premature there. What is your profession? A. I am a physician.

Q. Are you a physician admitted to practice medicine in the Territory of Alaska?

A. Yes, I am.

Q. How long have you been so admitted?

A. Since 1953.

Q. And where were you before you came here?

A. I was in Astoria, Oregon. I practiced there for somewhat less than a year.

Q. Where did you get your training, Doctor?

A. Well, I am a graduate of the University of Michigan, [16] Bachelor of Arts degree, 1946, and then my medical degree was obtained at Vanderbilt University.

Q. And what year was that? A. 1950.

(Testimony of Dr. Harvey W. Anderson.)

Q. What did you do following your medical degree?

A. I had a medical internship at Yale from '50 to '51. Then I had a rotating residency the following year lasting twelve months at a General Hospital in California.

Q. Where was that located?

A. Bakersfield, Kern General.

Q. And you have been in, you have been practicing medicine here in Fairbanks since 1953?

A. March first '53, a little bit over two years.

Q. With whom are you associated here?

A. Doctor Weston and Doctor Lundquist.

Q. Is that known as the Doctors Clinic?

A. Yes.

Q. In the course of your practice of medicine, Doctor, have you had occasions to perform autopsys?

A. Yes, I have.

Q. How many would you say you have performed?

A. Oh, oh, probably fifteen or twenty all together.

Q. And, Doctor, did you happen to perform an autopsy on the 31st day of January of this year?

A. Yes, I did.

Q. Do you recall the name of the deceased? [17]

A. Myrtle Cathey.

Q. And where did you perform this autopsy?

A. At the Fairbanks Memorial Chapel.

Q. Where is that located?

(Testimony of Dr. Harvey W. Anderson.)

A. Every time I head there I am confused. I believe it is on First or Second.

Q. It is in Fairbanks, Alaska, is it, Doctor?

A. Oh, yes.

Q. What was the general appearance of the deceased?

Mr. Taylor: Just a moment, Doctor, don't answer the question. If the Court please, we are going to object to any testimony by this Doctor on the condition of Myrtle Cathey or the results of any autopsy performed at that time on the grounds that there is no foundation laid to show the necessity of such an autopsy. The *res gestae* of the crime alleged in the indictment has not been shown and there is no showing at this time, your Honor, that such evidence as sought to be elicited from this Doctor is admissible upon the grounds that there is no showing of any connection of this defendant with the *res gestae*.

The Court: The Court doubts whether the foundation is sufficiently laid for the testimony of the autopsy at this time.

Mr. Stevens: Is the Court sustaining the objection made by Mr. Taylor on the ground made by Mr. Taylor? [18]

The Court: Not on the ground of necessity as urged but I don't believe the proper foundation has been laid for the testimony of the Doctor at this time.

Q. (By Mr. Stevens): How did you happen to

(Testimony of Dr. Harvey W. Anderson.)

go to the funeral home that night, Doctor Anderson, or that morning?

A. Well, Doctor Weston and I went over about five o'clock Monday afternoon.

Q. Was it in the afternoon on Monday?

A. Yes, about five, four-thirty or five o'clock.

Q. And were you requested to perform that autopsy by any person?

A. Yes, Mrs. Nordale.

Q. The United States Commissioner?

A. Yes.

Q. You stated that it was approximately four-thirty in the afternoon on Monday?

A. Yes, sir.

Q. And that was the 31st day of January of this year?

A. It was, yes.

Q. Doctor Weston was with you?

A. Yes, he was.

Q. Now, would you tell us the general appearance of the deceased, that is the general physical appearance of the person you saw there?

Mr. Taylor: Just a moment, Doctor. We are going to [19] object upon the grounds the, it would be inadmissible at this time, immaterial, irrelevant, as no part of the *res gestae* has been proven, no connection shown as to any crime being committed and I think the testimony of this Doctor is too early in point of time, your Honor, and another thing, your Honor, I don't think the appearance of the deceased, if the Doctor is allowed to testify, is

(Testimony of Dr. Harvey W. Anderson.)

admissible unless it is showed that the appearance was the cause of death.

The Court: Overruled. He may answer.

Dr. Anderson: Well, her appearance was that of a woman who had undergone injury particularly about the head. She had two healing cuts of the lower lip and the upper lip on the left side. These were about a half-inch deep and she had a scab over her nose and there were dark cutaneous discolorations behind both ears and the largest one was behind the, between the shoulder blades measuring about seven inches across. This was, had a diamond shape. There was also a large four inch bruise on the outer aspect of the left shoulder. There was also a large discoloration over the left hip. Apart from that there wasn't any evidence of injury, a few shin bruises.

Q. (By Mr. Stevens): Could you tell us the approximate size of this deceased person?

A. Well, I didn't take her length. She appeared to me to be about five foot six or seven inches tall and she was a good-sized person. She wasn't at all slight. I would estimate [20] her weight to be a hundred fifty pounds, slightly obese.

Q. You used the word cutaneous, Doctor. Would you tell us what that means? A. Skin. Skin.

Q. What did you use that in reference to?

A. The discolorations behind the ears and on the shoulder and the hip.

Mr. Taylor: What was that word, Doctor?

Dr. Anderson: Cutaneous.

(Testimony of Dr. Harvey W. Anderson.)

Mr. Taylor: How do you spell it?

Dr. Anderson: C-u-t-a——

Mr. Taylor: Oh, I see.

Q. (By Mr. Stevens): At that time did you perform an autopsy? A. Yes.

Q. What did you do to perform this operation?

A. Well, it was a——

Mr. Taylor: Just a moment, Doctor. Now, I am going to broach, your Honor, the same objection. No *res gestae* having been proven, no *prima facie* case has been made and there has been no connection shown between the testimony of the Doctor and the defendant. No way been connected up, your Honor, and it is out of line and out of place and we feel that a violation of the rules of evidence, your Honor, to allow this Doctor to go ahead at the present time.

The Court: Overruled. He may answer. [21]

Dr. Anderson: Well, this autopsy was, was called a complete autopsy wherein we not only open the chest and abdomen to see the organs contained in those areas but also the head. Many times we don't have permission to do an autopsy. People are afraid that the head will be opened or spoil the appearance at a funeral or what not, but this was a case where I felt the damage was to the brain, so I did a complete autopsy. Consists of lifting off the top of the skull after the scalp is incised and the bone is cut with an electric saw and then the chest and abdomen are opened in the usual autopsy fashion. Do you want that described?

(Testimony of Dr. Harvey W. Anderson.)

Q. (By Mr. Stevens): No, Doctor, I would like to have you describe what you found when you removed the scalp, if you would, please.

A. The temporalis muscles on either side of this person contained large hemorrhages. These are the large, flat chewing muscles that are present on each side of the skull, mastication muscles, and there were hemorrhages beneath these and then when the skull was removed the dura mater, which is the tough fibrous layer between the skull bone and the brain that was next opened and on the right side of the brain blood came out under pressure and then clotted blood was present on the central top surface of the brain on the right side. There was no evidence of skull fracture and there didn't appear to be any abnormality of the brain except the presence of the blood on the surface. [22]

Q. Would you tell us the location of this hemorrhage, I take it it was a hemorrhage in the brain, is that correct?

A. Hemorrhage on the surface of the brain.

Q. Where was that located?

A. It was located on the right half of the brain. It would be on the parietal surface, which is the central surface, top part.

Q. Is that the top right side of the head?

A. Yes.

Q. Did you examine the chest cavity?

A. Yes.

Q. Would you tell us if you found any evidence of abnormality or any type of disease?

(Testimony of Dr. Harvey W. Anderson.)

A. No, there didn't appear to be anything wrong with the heart or lungs and similarly in the abdomen. The various organs appeared normal. In a case of this kind where there are external marks of injury occasionally the spleen may be ruptured in the abdomen accounting for death. This organ, however, was intact. The uterus was normal in size and did not in any way suggest the appearance of pregnancy.

Q. Doctor, based on your findings by performing this autopsy, did you reach a conclusion as to the cause of death of this person?

Mr. Taylor: Just a moment, your Honor, we are going to object to that upon the grounds there is no *res gestae*, no evidence of that at this time to connect the crime with the [23] defendant; no evidence to connect the deceased with the defendant. Be irrelevant, immaterial and inadmissible at this time.

The Court: Overruled. He may answer if he knows.

Dr. Anderson: Yes, I believe the cause of death was very clear. I would say the cause of death was cranial injury as evidenced by the——

Mr. Taylor: Just a moment, Doctor. Just answer the question, what was the cause of death, hemorrhage or what.

Mr. Stevens: Don't answer Mr. Taylor's question. You were answering my question. Please, continue, Doctor.

(Testimony of Dr. Harvey W. Anderson.)

Mr. Taylor: We the going to object, your Honor, to any further question except what the Court is going to admit as to actual cause of death.

The Court: The reporter will, please, read the question asked by Mr. Stevens, and, Doctor, if you will listen to it again and answer it.

(Thereupon, the reporter read the question.)

The Court: You can answer that question yes or no, I believe.

Dr. Anderson: Yes.

Q. (By Mr. Stevens): What was the cause of death, Doctor?

A. Brain injury as evidenced by subdural hematoma.

Mr. Taylor: Would you translate that, Doctor, so we will know what that means?

Mr. Stevens: Your Honor, I ask that Mr. Taylor make [24] his objections to the Court and wait until the proper time for cross-examination.

The Court: Yes, that is right. You may object and you will have an opportunity to cross-examine.

Mr. Taylor: If the Court please, I didn't mean to object to it but so we would know what those last few words were for our own use so we could make a proper objection.

The Court: You could bring that out on cross-examination or at least address your objections to the Court and you will have an opportunity with this witness.

Q. (By Mr. Stevens): I believe, Doctor, you

(Testimony of Dr. Harvey W. Anderson.)

stated that the cause of death was cranial injury as evidenced by this——

A. Brain injury.

Q. You also just stated, did you not, there was no evidence of a fracture of the skull, is that correct?

A. Yes.

Q. Did you ascertain the cause of the brain injury?

Mr. Taylor: Just a moment, your Honor, we are going to object to that. There is no foundation laid for that nor is there any connection, the cause of death of Myrtle Cathey with the defendant, highly improper at this time, your Honor, unless the *res gestae* or *prima facie* case is made out in some way connecting this defendant with the testimony that is now being elicited from this witness.

Mr. Stevens: Maybe we could straighten Mr. Taylor out then. [25]

Mr. Taylor: Mr. Taylor don't need straightening out.

Mr. Stevens: The government is attempting to set up the *corpus delicti*.

The Court: He may answer if he knows that last question. Do you know what the question is now, Doctor, or shall we have it read to you?

Dr. Anderson: He asked me what I thought the cause of the injury was.

Q. (By Mr. Stevens): Doctor, I will withdraw that if it disturbs you. Was the formation of this subdural hematoma the result of a natural development in that brain?

(Testimony of Dr. Harvey W. Anderson.)

Mr. Taylor: Just a moment, your Honor, I am going to object to that question as leading, prejudicial, not based upon the previous evidence of this witness.

The Court: Overruled. He may answer.

Dr. Anderson: Will you state your question again, please?

Mr. Stevens: Would you read it?

(Thereupon, the reporter read the question.)

Dr. Anderson: No.

Q. (By Mr. Stevens): By examining the body of the deceased did you ascertain what caused the development of the subdural hematoma?

Mr. Taylor: Just a moment, your Honor, I am going to object until the result of the examination of the body is set [26] forth here, testified to by this witness.

The Court: I think he can answer if he knows.

Dr. Anderson: My answer to that is yes, there is sufficient external marks of injury about the face and cranial vault itself to indicate that injury had been done and subdural hematoma typically follows injury. Therefore, I believe that these external injuries as evidenced by bruises were the cause of this condition.

Q. (By Mr. Stevens): And you described these bruises, previously, did you not? A. Yes.

Q. And were those the bruises you described behind the two ears and about the face?

A. Mouth, nose and behind either ear, and then

(Testimony of Dr. Harvey W. Anderson.)

the autopsy, in the course of the autopsy the hemorrhages beneath the temporalis muscles indicated that injury had been done there as well, although that area is the lateral part of the skull and the scalp in that, in those locations did not show discolorations.

Q. And did you examine these various lacerations and discolorations to ascertain what type of injury had caused these results?

Mr. Taylor: Just a moment, the question is very indefinite when he mentioned these results. I think he should, what results should be set forth. [27]

The Court: I presume he means the results that the Doctor has testified to. He may answer if he knows.

Dr. Anderson: I did not examine these wounds to determine their cause. I examined them only to, well, I was thinking of when I first saw the patient, which was while she was alive. I did not examine these wounds to determine their cause. I however, have a clear idea of what the wounds looked like.

Q. (By Mr. Stevens): Well, by examining the wounds alone, Doctor, could you tell us whether or not any type of instrument was used to inflict those wounds?

A. Well, an instrument such as a knife, of course, would leave a cut. There were no such wounds as that.

Mr. Taylor: Just a moment, I am going to object. I think the answer calls for a yes or no.

The Court: I will strike the answer of the witness.

(Testimony of Dr. Harvey W. Anderson.)

Dr. Anderson: The question was, did I think——

The Court: Maybe it should be read, Doctor.

(Thereupon, the reporter read the question.)

Dr. Anderson: No.

Q. (By Mr. Stevens): Well, they are, I am confused, Doctor, is your; well, in your opinion, Doctor, what did cause the wounds?

Mr. Taylor: Just a moment, your Honor, I am going [28] to object to that upon the ground it calls for a conclusion.

The Court: Sustained. You might ask him if he has an opinion.

Q. (By Mr. Stevens): Do you have an opinion as to what caused these wounds, Doctor Anderson?

A. I think the cuts on the left side of the mouth would be——

Mr. Taylor: Just a moment, your Honor, I am going to object to any further testimony, cuts along side of the mouth or any wounds or of any wounds as would not tend to contribute to the death of Myrtle Cathey, be just superfluous, incompetent, irrelevant and immaterial. I think what we are trying to do is inquire into the death of Myrtle Cathey rather than any superficial wounds she might incur in any manner.

The Court: Objection overruled.

Dr. Anderson: I believe the mouth lacerations being rather ragged would be, could be well explained by a fist.

(Testimony of Dr. Harvey W. Anderson.)

Q. (By Mr. Stevens): Did you examine the, or did you have any opinion, just yes or no, as to the cause of the other lacerations and bruises on the body?

A. Yes.

Q. And what was your opinion, Doctor, as to the type of injury that could have caused the discolorations behind the two ears? [29]

A. She had numerous discreet bruises all over her body. I would say she was beat up.

Mr. Taylor: Just a moment, your Honor. I am going to object and ask that the question be stricken, or the answer be stricken as not responsive to the question.

The Court: It is not responsive and will be stricken. Proceed, Mr. Stevens.

Q. (By Mr. Stevens): Just confine yourself to the two ears, Doctor. You have an opinion as to what caused those you said, what type of injury caused the bruises behind her ears in your opinion?

A. The ears themselves were not damaged and yet behind each ear there were large bruises, so I believe that some object got behind the ears without injuring the ears; this object may have been a fist, it may have been a——

Mr. Taylor: Just a moment, Doctor, I believe you were guessing that time. I think the Court should admonish the Doctor not to guess what happened.

The Court: He is giving his opinion as I understand it, based on his examination of the body.

Q. (By Mr. Stevens): Doctor, in your opinion

(Testimony of Dr. Harvey W. Anderson.)

and from your examination of this body and your autopsy, could you state whether or not the, these injuries could have been caused by a blunt object, by fist or otherwise?

Mr. Taylor: Just a moment, your Honor, I am going [30] to object. The question is leading.

The Court: He may answer.

Dr. Anderson: I could not specify the exact object.

Q. (By Mr. Stevens): But could you specify as to whether or not it was a sharp or a blunt object?

A. I am quite convinced it was blunt.

Q. And from your observation of the body, could you tell us whether or not it was a large or small object?

A. Well, the one bruise was seven inches across, the one behind, between the shoulder blades. That was the largest bruise she had, that would have to be the largest object.

Q. Doctor, this is Government's Identification 6; could you identify that from the picture?

A. Yes.

Q. And you have seen the same type of objects before?

A. Yes, she had a tatoo on her left thigh. This is present in this picture.

Q. Does that picture fairly represent the state of the legs of the deceased at the time of your autopsy? A. Yes.

Q. This is Government's Identification 5, Doctor. Could you tell us is that the same person that

(Testimony of Dr. Harvey W. Anderson.)

you performed the autopsy upon? A. Yes.

Q. The person that was known to you as Myrtle Cathey, [31] Myrtle Patricia Cathey?

A. Yes.

Q. And does that picture fairly represent the state of the deceased's body at the time you performed your autopsy or just prior thereto?

A. Yes.

Q. This is Government's Identification 4, Doctor; could you tell us, is that also a picture of the deceased? A. Yes, it is.

Q. Do any of the bruises that you have described appear upon that picture? A. Yes.

Q. And are the, is the picture fairly representative of the condition of the deceased at that time? A. Yes, I believe so.

Q. This is Government's Identification 1, Doctor; is that also a picture of the deceased, Myrtle Patricia Cathey? A. Yes.

Q. And is it fairly representative of the condition of that part of the body that you examined?

A. Well, there is some difference here, that stain beneath the, between the shoulder blades does not show up here, but it is the same person.

Q. Does the picture show any portion that you have described, the discoloration?

A. Yes, this shows the area behind the left ear. [32]

Q. And that is fairly representative of the condition of the body except for the fact that it does not show all of the conditions?

(Testimony of Dr. Harvey W. Anderson.)

A. The other stain does not appear to be there, the stain behind the left ear is not shown well. The hair is in the way there.

Q. This is Government's Identification 2, is that a picture of the same deceased person, Myrtle Patricia Cathey? A. Yes, it is.

Q. And do any of these bruises appear upon that picture?

A. The left hip bruise shows very well here.

Q. And is that fairly representative of the bruise that appeared upon the deceased's body?

A. Yes.

Q. Are any of the other bruises there?

A. No, just that one.

Q. And this is Government's Identification 3, Doctor; is that also a picture of a portion of the deceased's body? A. Yes, it is.

Q. And do you identify that as being a picture of Myrtle Patricia Cathey? A. Yes.

Q. Is it fairly representative of the condition of that portion of the body? A. Yes.

Q. Doctor Anderson, these pictures are somewhat enlarged. [33] By that enlargement and from your memory as to the condition of the body are there any distortions as to the pictures presented here? A. No.

Q. Then they are all fairly representative of the body as you viewed it? A. Yes.

Q. Doctor, do you know who proclaimed this woman to be deceased, to be dead?

(Testimony of Dr. Harvey W. Anderson.)

A. No, one of the Doctors in the hospital at the time.

Q. Did you see the woman immediately after her death? A. Not immediately after.

Q. How soon after her death did you see her?

A. I just don't recall whether I went over there that night after she died or whether it was later on in the afternoon when we did the autopsy.

Q. You have described the cause of death as being subdural hematoma? A. Yes.

Q. Could this subdural hematoma have developed from any other cause than the injuries you have described? A. Yes.

Q. What would that have been?

A. Spontaneous subarachnoid hemorrhage occasionally occurs.

Q. Was there any evidence to show to you that that had [34] occurred in this case?

A. No.

Q. Now, Doctor, had you seen this woman as a patient while she was alive? A. Yes, I did.

Q. When was the first time you saw her, if you recall?

A. It was on a Saturday evening, January 22nd.

Q. And approximately what time was that?

A. That was about, oh, eight-thirty or nine o'clock in the evening.

Q. Where did you see her?

A. At the Club Alibi.

Q. Where is that located?

A. That is on South Cushman, about 22nd or

(Testimony of Dr. Harvey W. Anderson.)

23rd and South Cushman, on the left-hand side as you go out of town.

Q. Is that also in the City of Fairbanks or right near the City of Fairbanks?

A. It is about on the border line.

Q. Fairbanks, Alaska, that is. Is that correct, Doctor?

A. Yes, I believe it is right on the City limits.

Q. Now, how did you happen to go there?

A. Mr. Urban called my home and requested me to make a visit there.

Q. And what did you do when you arrived; how did you get in to start with, to the Club, did you enter the Club?

Q. Yes, I did. I drove up there and parked the car in [35] front and I didn't see any lights on in front so I went around to the back where he had a light on and I went in the back door and then I went and proceeded to see the patient.

Q. And where was the patient?

A. There appeared to be only one room there apart from the bar and a room where several tables were, and the bed in it and that is where the patient was.

Q. By the patient, do you mean the same person, the deceased person, Myrtle Cathey?

A. Yes.

Q. What did you do at that time with the patient?

A. I examined her and I inquired of Mr. Urban what was wrong with her and he said that she

(Testimony of Dr. Harvey W. Anderson.)

had been out with some girls earlier in the day, early that morning, Saturday morning early or Friday night late and that she had been in a fight so he wanted me to do what was necessary, fix her up.

Q. What was her condition, Doctor?

A. Well, I examined her and found her to be this way. I could smell alcohol on her breath and she had somewhat stale cuts on the lips and she had gross swelling of both cheek regions. She had a small cut on her nose. She had bruises behind, I believe I noted at that time she had a bruise behind the left ear, scattered bruises about the body, no significant bruising on the trunk and I looked in her mouth and didn't see any tongue lacerations, took her blood pressure which was normal, and then I proceeded to sew up these cuts on her lips. [36]

Q. Did you give her any other type of administration, Doctor, any other type of medicine?

A. I gave her an injection of penicillin preventively with regard to an infection which I thought would set up in the lip lacerations because they looked rather dirty. They weren't fresh wounds.

Q. Was she coherent at that time?

A. I would say not because I didn't have any, wasn't able to have any conversation with her. The only thing I could get out of her would be "leave me alone, go away" at the time when I was injecting the novocaine or putting in stitches. That is the only type of answer I got out of her.

(Testimony of Dr. Harvey W. Anderson.)

Q. Did you leave any type of instructions for her care?

A. Well, I told Mr. Urban to call me the following day if she needed, if he thought she needed any further treatment. I would be glad to come out and see her.

Q. As you entered the Alibi Club, Doctor, was there anyone else present? A. No.

Q. Then just the deceased and Mr. Urban were present during the time you have related?

A. Yes.

Q. Did Mr. Urban call you the next day?

A. Not to my knowledge.

Q. Did you see the deceased again before her death? A. Yes, I did. [37]

Q. Do you recall when that was, Doctor?

A. That was the following Sunday, that is a week, Sunday a week after that Saturday, that was January 30th.

Q. And what time was that?

A. Well, this again was in the evening about nine o'clock.

Q. And how did you happen to go to see her a second time?

A. Mr. Urban called again and said to come quick because something has happened. He heard a clicking noise and she was all tight or something and having some kind of a spell and I had better hurry, so I hurried.

Q. Did you go to the same place?

A. Club Alibi?

(Testimony of Dr. Harvey W. Anderson.)

Q. Yes. A. Yes.

Q. Was there anyone there besides the deceased and Mr. Urban? A. No.

Q. Did you see the deceased at that time?

A. Yes, I did.

Q. And where was she on this second occasion?

A. She was in the bed.

Q. The same bedroom?

A. The same bedroom, the only bedroom.

Q. And what did you do for her at that time?

A. I looked at her again and I could see that the left [38] side of her body was in a convulsion. It was a clonic type, intermittent type of convulsion and I noticed that her left pupil was small, fixed, and right pupil was dilated and fixed. These are the pupillary signs plus the active convulsion and presence of absolute unconsciousness which was detected, too. These three things made me put her in the hospital right away. These are signs of serious brain injury. That is what we did. I called the ambulance.

Q. Did you have occasion to examine her body at that time? A. Yes.

Q. Did you, would you tell us the condition of her body at that time?

A. Well, the lacerations were scabbed over and showed fairly good evidence of healing. The swelling about the cheeks and nose was gone from the previous week. The little cut on the nose was healed over and the various skin discolorations had a darker color. They were more purplish in color and as I

(Testimony of Dr. Harvey W. Anderson.)

recall from the first visit these bruises were more of a bluish, not really as evident.

Q. The time of your second visit, Doctor, was the deceased conscious at any time? A. No.

Q. Did you have a discussion with Mr. Urban at the occasion of the second visit concerning your patient? A. Well, I talked to him. [39]

Q. Was there anyone else there at that time?

A. No.

Q. And what was the, this was approximately nine o'clock on the 30th day of January, Doctor?

A. About nine o'clock.

Q. What was the conversation that you had with the defendant concerning the deceased?

Mr. Taylor: Just going to object and ask the Court restrict that strictly to the condition of the deceased. Under the present questioning that is about all that can be gone into at this time. Otherwise there is no *res gestae* laid for any conversation of this defendant.

The Court: He may answer.

Dr. Anderson: Well, I asked him what happened and——

Mr. Taylor: I am going to object, your Honor, because that is repetitious. He has already testified to that, what happened.

The Court: Overruled. Continue, Doctor.

Dr. Anderson: And he said that the patient had been doing very well during the week and he showed me a chair which he had there outside the bedroom door which had a plaid blanket draped over it, and

(Testimony of Dr. Harvey W. Anderson.)

he said that she had been getting better every day and she had been sitting up here and then all of a sudden, just before he called me that she had had this spell. He evidently was close by. He heard this clicking sound and he [40] turned around and she was having this fit or this spell and he didn't know what to do so he called me. That was the essential content of what we talked about.

Mr. Stevens: Your Honor, we have been approximately an hour. Could we have a ten minute recess at this time?

The Court: Yes. Members of the jury, once more I admonish you not to discuss the subject matter of this trial with anyone; not to permit anyone to discuss it with you; not to listen to any conversation concerning the subject of this trial; and do not form or express any opinion until the case is finally submitted to you. We will take a ten minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:50 p.m., the Court took a recess until 4:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel and the government attorneys.

Mr. Taylor: We will stipulate that all members of the jury are present, your Honor.

Mr. Stevens: The government so stipulates, your Honor.

(Testimony of Dr. Harvey W. Anderson.)

The Court: Thank you, Mr. Stevens. You may proceed.

DR. HARVEY W. ANDERSON

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination. [41]

Q. (By Mr. Stevens): Now, Doctor, you have told us that you examined the deceased on the evening of the 22nd day of January and also on the evening of the 30th day of January, this year. Would you tell us in your opinion if there was any significant difference in her condition on the second occasion other than the item that you told us concerning the fixation of the eyes?

A. Well, those findings indicated that she was about as close to being dead as a person could get, whereas on the first occasion she seemed to be in fairly good condition. Couldn't tell for certain, however, how much was injury and how much was alcohol, but on the second occasion she was critically ill.

Q. Well, on the second occasion did you discover any significant indication of injury that you had not discovered on the first occasion? A. No.

Q. Then except for the fact that the bruises had become more discolored there was no additional indications of injury in that ten-day period?

A. Not that I could see.

Q. You stated that on the evening, the first evening, the 22nd day of January that you observed

(Testimony of Dr. Harvey W. Anderson.)

the odor of alcohol, is that correct? A. Yes.

Q. As a physician, did you have an opinion as to the [42] state of sobriety of your patient at that time?

A. I would say my opinion was that she was intoxicated because her only answers were of very brief surly sort, leave me alone, as I said before the only thing she said, "go away, leave me alone," voice was very mushy.

Q. And I believe you also testified that you left instructions that you should be called the following day in the event the patient needed further treatment, is that correct?

A. Yes, I invited him to call me the following day if he thought she wasn't any better.

Q. Doctor, assuming that the effects of the alcohol had been eliminated and you had been able to see this patient of yours the following day, in your opinion as a physician would you have been able to aid the woman?

Mr. Taylor: Just a moment, Doctor. I am going to object to the question, your Honor, assuming, it is hypothetical question, your Honor, assuming something not in evidence. Be merely a conclusion, wouldn't even be a medical opinion, your Honor.

The Court: I am going to permit him to give his opinion if he has one.

Dr. Anderson: It is well known that alcohol will mask neurological symptoms, and it is hypothetical, of course, but I would say that on the following

(Testimony of Dr. Harvey W. Anderson.)

day I would be in a position to accurately estimate the damage that had been done. [43]

Q. (By Mr. Stevens): What are the symptoms of a normal person who is suffering from a subdural hematoma, who is not under the influence of alcohol, Doctor?

Mr. Taylor: Just a moment, Doctor. I am going to object to it. I don't think it is relevant or material to the issues, your Honor, at this time. I think it calls for an answer to a hypothetical question, assuming something not in evidence. I don't think it has any bearing on this matter whatsoever. We feel that it would be highly prejudicial.

The Court: The Court is going to permit the witness to give his opinion.

Dr. Anderson: The symptoms of subdural hematoma are headache principally, dizziness, perhaps partial loss of vision, depends, of course, on the location of the hematoma, what part of the brain is being pressed, but headache is the symptom which would be present at all cases.

Q. (By Mr. Stevens): And you stated, did you not, that the effects of alcohol will cloud the neurological difficulties, neurological symptoms, was that your statement, Doctor? A. Yes.

Q. And could you explain to us the reason why that would occur?

Mr. Taylor: If the Court please, I believe, your Honor, that is going a little bit beyond the scope of the [44] question. The fact that he has answered the question which was objected to but the Court

(Testimony of Dr. Harvey W. Anderson.)

allowed in. I think that he has answered. I think asking the reasons now why certain things would occur and which are not connected with this case, your Honor, should not be admitted, would be immaterial, irrelevant, incompetent.

The Court: He may answer if he knows.

Q. (By Mr. Stevens): Do you understand the question, Doctor?

A. Yes, alcohol is a central nervous system depressant and certain forms of injury have a depressant function on the part injured. Therefore, you don't know what part is injury and what part is alcohol until the alcohol is cleared. Alcohol depresses the whole system.

Q. And the presence of alcohol then on the 22nd of January, 1955, on your patient, was that to such an extent that it would have had this effect?

A. Yes.

Q. On the first occasion, the 22nd day of January when you first saw the deceased, did you have an opportunity to observe the surroundings in the room in which she was located; did you examine the room at all?

A. Casually.

Q. Did you notice the manner in which she was dressed?

A. Yes, I believe she had a robe, wore a robe.

Q. Could you tell us the condition, her condition at [45] the time you examined her the first time?

Mr. Taylor: Just a moment, I object on the grounds it is repetitious, Mr. Stevens.

Mr. Stevens: I am not finished yet, Mr. Taylor.

(Testimony of Dr. Harvey W. Anderson.)

The Court: Counsel has just stated, I don't think you heard him, counsel has just stated he had not finished his question.

Q. (By Mr. Stevens): That is, her condition the first time you examined her as concerns the quantity of blood, if any, that was coming from her wounds?

A. There was no bleeding at the time I saw her. There was a small amount of blood around and about the teeth from the lacerations on the overlying lips and there was, I believe there was a little bleeding in the nose also, no active bleeding when I was there. She, she was having the bleeding of her menstrual flow apparently at that time. She was wearing a, wearing a sanitary pad, but there was no bleeding from any of these injuries.

Q. Did you at any time during the time when the deceased was your patient give her a prescription for any type of medicine?

A. No, I do not believe, I do not believe I did.

Q. Doctor, I would call your attention again to the time that you examined the body of the deceased when you performed the autopsy. I would like to ask you if in your [46] opinion a fall could have caused the injuries that brought about this subdural hematoma that you have described?

A. No, I do not believe so.

Q. Well, as there have been a series of lacerations and effects of injuries described by you, Doctor, do you have an opinion as to whether or not

(Testimony of Dr. Harvey W. Anderson.)

a series of falls could have caused these injuries which brought about the subdural hematoma?

Mr. Taylor: If the Court please, I believe that is going a little far afield by a medical doctor, as to what a series of falls would do, show where his medical training, medical experience has been along that line, I will withdraw the objection. At the present time I think it would be mere conjecture on the part of the doctor. I don't think it goes to prove anything, falls are of such various degrees, your Honor, and some different distances a person might fall, the object they might hit, what part of the body they might strike. I think the question would be so difficult to answer, so misleading it would be highly prejudicial to the defendant in this case.

The Court: Perhaps, but the Doctor may answer.

Dr. Anderson: I think his answer was a good one. It is highly conjectural and in my practice I haven't seen anybody experience a series of falls. I just couldn't say. If you will value my speculation above that of anyone else, I will be glad to speculate. [47]

Q. (By Mr. Stevens): You have not formed a professional opinion on that, is that correct? What is the medical term for the location of the bruises behind the ears, Doctor, the part of the body, the part of the head?

Mr. Taylor: Just a moment, Doctor. I wonder if the reporter would read that question.

(Testimony of Dr. Harvey W. Anderson.)

(Thereupon, the reporter read the question.)

Dr. Anderson: The location is the mastoid process of the temporal bone, the temporal bone is one of the bones which go in to compose the skull.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Doctor Anderson, had you ever known Myrtle Cathey during her lifetime other than or prior to January the 22nd, 1955? A. No.

Q. About what age was Myrtle Cathey to the best of your opinion based upon your examination of her? A. Oh, about thirty years of age.

Q. And what time of the evening was it on January the 22nd, now, all the questions in regard to dates we will naturally assure 1955, so if I say January 22nd, we will assume it is 1955. What time of the evening was it that you saw Myrtle Cathey? [48]

A. About eight-thirty or nine o'clock.

Q. And what time did you get the call, Doctor?

A. I believe it was before eight.

Q. And you had other matters then that required your attention before you went out to see her, is that right?

A. I was out on a different call when he called the first time, and my wife had his number there and I believe he called me back again before I had left.

Q. And I believe you stated there was no other

(Testimony of Dr. Harvey W. Anderson.)

person present at the time you went to the Alibi Club? A. Yes.

Q. Now, you have testified, Doctor, as to quite a number of contusions and I believe you also stated, cutaneous injuries, that is only skin injuries, is it not? A. Yes.

Q. Those cutaneous injuries, were they slight, Doctor? A. No.

Q. What? A. No.

Q. What was the injury to the skin that you would say would be serious?

A. Any skin discoloration about three inches across would be more than minor.

Q. Well, but isn't, Doctor, isn't that caused by a collection of blood under the skin itself, not an injury to the skin itself? [49]

A. The stains she had in certain places were, are capillary hemorrhage which would be within the skin structure itself.

Q. And were, they also would be sub-capillary breakage in the muscles themselves?

A. Breakage of the muscles.

Q. No, of the blood vessels in the muscles?

A. There can also be, it depends on the sight, the places where the discoloration was most violent behind her ears there are no muscles right there at that point, so I put it in terms of being a cutaneous discoloration.

Q. Didn't you state in response to a question by Mr. Stevens that you could squeeze the blood out of

(Testimony of Dr. Harvey W. Anderson.)

that location back of the ears, that there was a gathering of blood back under the skin?

A. No, there was no question along that line.

Q. What?

A. I wasn't asked a question like that.

Q. Well, was there blood, a coagulation of blood or partially coagulated in that swelling in the back of the ears; did you make an exploratory search into that discolored portions back of the ears, you say they were swollen?

A. I didn't say they were swollen.

Q. Not swollen, just discolored, is that right?

A. That is it.

Q. Did you make an exploratory search? [50]

A. In the autopsy?

Q. Yes.

A. No particular search except the incision used to remove the top of the skull and this incision would go through the upper part of the area in question.

Q. Now, how much of the skull did you remove, Doctor, when you removed the skull to make an examination of the brain which I presume that you removed the skull for that purpose. How much did you take off, cut her off above the ears?

A. It is about fifty per cent.

Q. Now, just show on your own head there, Doctor.

A. The entire upper hemisphere, the top half.

Q. Then break that back down and that exposes the brain?

A. Yes.

(Testimony of Dr. Harvey W. Anderson.)

Q. And without, but in regard to the discoloration back of the ears, you cut above that, did you not, Doctor? A. Yes.

Q. But did you explore in below the edge of the skull that was exposed there to ascertain whether there was any fracture below this cut off area?

A. No, the outer table of the skull was not explored.

Q. Was there any fracture on the skull after it was removed?

A. The skull in its entirety could be visualized, that is the entire top half and the bottom half which was remaining after the brain was lifted out and in the lower half and [51] in the freely moveable upper half no fractures were observed.

Q. Now, when you lifted that top of the skull off, Doctor, would you, using your own head as an illustration, show where on the brain the hemorrhage, the subdural hematoma, as you call it, was that the right name? A. Subdural.

Q. Subdural, oh, yeah, subdural hematoma, whereabouts, would you point out on your own head about? A. This.

Q. Right front, is that right, and how big was it? A. About this size.

Q. And what was the condition of the blood in that area where the hematoma occurred?

A. The main part of the blood was clotted, but the spinal fluid which escaped when the dura was opened was bloody.

(Testimony of Dr. Harvey W. Anderson.)

Q. Now, you say the greater part of the hematoma, the subdural hematoma was clotted?

A. Well, hematoma by definition is clotted blood, so it would be hundred per cent blood.

Q. It is a clotted hemorrhage, is that right?

A. Yes.

Q. Did you have any way of ascertaining how much blood had drained from the blood vessels into the brain to cause that amount of clotted blood?

A. You might say there would be a way of ascertaining if you carefully lifted off all the little clots and put them [52] in a cup. That would be a way of ascertaining, but that was not done.

Q. Then could you have told, Doctor, from an examination as to how long that blood had been draining into the area that caused this, that formed this hematoma, this clotted blood?

A. Yes, the blood was loosely clotted and I would believe that hemorrhage could be said to be recent.

Q. Although it was clotted? A. Yes.

Q. Would it clot much more rapidly after death, Doctor? A. Blood?

Q. Yeah? A. Any blood?

Q. Well, the blood that would drain into the brain cavity there must have been a broken blood vessel there to get that blood into the brain, was there not? A. Yes.

Q. Did you ascertain, pick up the blood vessels that were broken? A. No.

Q. And so you have no way of telling how long

(Testimony of Dr. Harvey W. Anderson.)

that blood would have been draining into the cranial cavity then, is that right?

A. I could say that it would be less than a month because I do know cases I have seen in neurosurgery that clots that have been there for a month or two have a tough surface [53] to them. They are definitely organized and then they have a serum in the center. This was nothing of the kind. The clot couldn't even be picked up.

Q. Now, Doctor, what is it you call the membrane that surrounds the brain in which the brain is contained; is there a membrane that houses the brain?

A. That is the pia mater.

Q. Was that ruptured in any place of the brain that you could see?

A. The pia mater was, is a very, very delicate membrane and there was no definite rupture of it. The bleeding was all above that.

Q. Now, you used the word cranial and the word cranium. I will ask a leading question. Is the cranium approximately that part of the skull that you lifted off when you made the autopsy?

A. No, that would be called calvaria.

Q. What would the cranium consist of?

A. The head.

Q. On any side, inside of the bone structure of the head then would be intercranial, is that right?

A. Well, cranium is just another way of saying head.

Q. When you used that you meant anything that occurred in the head, would that include those

(Testimony of Dr. Harvey W. Anderson.)

wounds back of the ears? A. Yes.

Q. Now, was the skin broken in those two contusions [54] back of the ears, Doctor?

A. No, it wasn't.

Q. No skin broken. Now, something I just about overlooked here, you say that Myrtle Cathey had blood around her mouth? A. Yes.

Q. And about how much blood was visible from the outside when you made your first——

A. Oh, very, very small amount of dried blood on the teeth and surface of the gums.

Q. Then did you look inside of her mouth, Doctor, to see, to ascertain what caused the blood around her mouth?

A. I looked to see, I looked at the tongue.

Q. Show any marks or wounds on the tongue?

A. The tongue looked normal.

Q. How did the teeth look?

A. Looked dirty is all.

Q. Like blood?

A. The teeth seemed to me to be dingy.

Q. What?

A. Perhaps dingy and dry. There was no moisture on the surface of the teeth.

Q. Did you notice any blood in between the teeth or on the gums? A. Yes.

Q. And did you from your examination did you ascertain [55] where that blood came from?

A. I assumed that it came either from the nose or the cut on the lips.

Q. Now, where on the lip was the cut?

(Testimony of Dr. Harvey W. Anderson.)

A. It was slightly left of the midline on both the upper and lower lips.

Q. Was that on the outer part of the lip or the under part, inner part of the lip?

A. Both the inner part and the top of the bottom lip.

Q. And, when you got there though this was all dried blood that you saw around on the lips, was it, that you saw?

A. Yes.

Q. And then you took some stitches in the lip?

A. Yes.

Q. And the lower lip, isn't it a fact, Doctor, you had to pull it, kind of expose it, to make those stitches?

A. Slightly.

Q. How many stitches did you put in the lower lip?

A. I don't recall exactly.

Q. How many in the upper?

A. I don't recall either location. Several.

Q. Well, Doctor, would those injuries to the lips be of such a nature that they might cause death?

A. No.

Q. Call them more or less superficial wounds or contusions? [56]

A. I would.

Q. Now, you, did you examine the body or not the body, but the torso of Myrtle Cathey on the afternoon of January 22nd?

A. On the afternoon?

Q. Yeah, the first time you went there?

A. In the evening there?

Q. Yeah, in the evening?

A. Yes, I did. I checked here extremities for

(Testimony of Dr. Harvey W. Anderson.)

fractures and just had a general sizing up look. It wasn't a thorough examination by any means.

Q. It was such an examination though, Doctor, that in the event that there was other wounds or fractures you would be able to take care of them, is that right? A. Yes.

Q. Now, you said that there were considerable discolorations at various places on her body and legs; were those discolorations quite pronounced, Doctor?

A. I wouldn't say so, not on the original visit. The swelling was.

Q. What color was it, blue or purplish?

A. Oh, a rather bluish. The swelling at that time was more a feature than the discoloration.

Q. And what would that swelling denote, Doctor? A. Indicates inflammation.

Q. Or a hematoma?

A. Well, swelling of a hematoma is, usually appears as [57] a blue lump and these swellings were, didn't have that amount of coloration, I would say a faint blue. Appeared to be an ordinary fresh bruise.

Q. And some people, I believe, Doctor, do they not bruise much easier than others; some people a very slight blow will induce a considerable discoloration of the skin or the sub-cutaneous area?

A. Yes, some do have a bleeding tendency. That is true.

Q. And others can take considerable blows and

(Testimony of Dr. Harvey W. Anderson.)

there will be very little, if any, discoloration, is that right?

A. I wouldn't say that. That again is something I don't know too much about. The first half of the question I would say that some people do from small injuries.

Q. It is very easy, it is not, Doctor, to detect old bruises from fairly recent bruises?

A. Generally, yes. It is difficult, however, to put a date on various bruises.

Q. Now, of course, some of these questions certainly are not based on my medical knowledge. Some of them are based on what I have seen and possibly an occasional black eye I have had and is it not a fact, Doctor, that it takes some little time after, that is an ordinary blow before any discoloration starts?

A. Yes, it is usually, a bruise generally shows only redness for a few hours.

Q. A redness for a few hours and then what change takes [58] place, Doctor?

A. Then as it depends on the severity of the bruise, of course, but generally in a bump that is red, it will then take a faint bluish color, maybe that color for several days and then may appear as a yellowish or a brown stain for a matter of several weeks beyond that.

Q. Now that, before it starts to turn off to a yellowish or brown that you mentioned, isn't it a fact that a lot of peoples bruises that way turn to a kind

(Testimony of Dr. Harvey W. Anderson.)

of purplish color for awhile and then gradually fades off into a brown or yellow?

A. Purplish or blue, yes.

Q. Yeah, now when you examined the body of Myrtle Cathey or not the body but when you examined her at the Club Alibi on the 22nd of January, was your examination of sufficient, sufficient enough to disclose whether there were any old bruises on her?

A. It was not a detailed examination. I am sure that I would have noticed a wide-spread or severe old bruise but I didn't.

Q. A bruise that had been inflicted about a week or two before, not too severe, it still could have been there without you taking the particular pains to see it, is that right?

A. Oh, yes, I certainly agree to that.

Q. Now, when you examined Myrtle Cathey, her body, performed an autopsy at the funeral parlor here in Fairbanks, [59] what was the difference in discoloration of the bruises then from what they were when you saw her on the 22nd of January? I believe you stated you performed the autopsy on the 31st, is that right? A. Yes.

Q. What was the difference in the bruises, the color of the bruises from the first time you saw her and the time you performed the autopsy?

A. The bruises behind the ears on the first visit were not particularly impressive. I do recall there being a certain reddish, bluish area present particularly behind the left ear, but on the 31st these

(Testimony of Dr. Harvey W. Anderson.)

areas had a very, very violent dark purple stain indicating an ecchymoses, which is a cutaneous capillary hemorrhage that just wasn't evident on the first visit.

Q. In other words, considerably more discolored at the time you performed the autopsy then. Doctor?

A. Yes.

Q. Now, Doctor, isn't it a fact that after death the blood settles to the lower portion of the body and the blood will drain to those parts and become discolored?

A. The body will become discolored thereby?

Q. Yes. A. Yes, that is true.

Q. Now, Doctor, you stated you examined the heart of the deceased? [60]

A. Yes.

Q. What was the extent of that examination, Doctor?

A. You are speaking of the autopsy?

Q. Yes, sir.

A. It consists of removing the heart from its location. It is enclosed in a sack which is called a pericardium and the heart appeared to be normal in size and first thing I did was look about to see if there was any evidence of coronary thrombosis which, of course, would, could be cause of death and this would be shown by changes in the coloration of the heart wall, but I couldn't detect anything wrong with the heart at all. I opened up the major arteries also.

Q. From your knowledge is there any diseases of the heart or anything that can happen to an ap-

(Testimony of Dr. Harvey W. Anderson.)

parently sound heart that will cause fairly sudden death?

A. Well, primary heart disease, death due to, death on a cardiac basis but without cardiac disease. I do not think of any right off.

Q. What, for instance, would happen if a fairly large blood clot lodged in one of the valves of the heart that prevented it from functioning? No, Doctor, in response to a question by Mr. Stevens in which he asked you if these contusions and swelling could have been caused by a fall, I believe your answer was no. Now, can you explain to me the difference between something striking a person on the head or somebody's head striking a rock or cement sidewalk, edge of [61] a table; does not that fall create the same condition as a blow on the head?

A. In some cases, yes. I was thinking particularly of the mouth. How difficult it would be to fall on the most common destination which would be the floor and cut both lips without doing anything to the tip of your nose, and then, too, with regard to a fall, it would be very difficult, I think, to obtain a discreet bruise behind an ear by falling against, again on the favorite object, the floor, without injuring the ear or lacerating the ear. The ears are very easily torn and lacerated, but here was a bruise right behind the ear. The ear itself was in good shape so unless she fell or unless a person fell on something that was prominent, angular, then——

Q. Did you ever notice the construction of the ordinary bar in a saloon, Doctor?

(Testimony of Dr. Harvey W. Anderson.)

A. Not in great detail.

Q. I just asked you if you notice particular type of a bar, flat, comes over to the edge upon which the consumer sits, it kind of flares up a little, flat, then down so it leaves the edge of the bar about so wide, about that much elevated above the bar?

A. Yes; I have seen that type of a bar.

Q. Now, if somebody was quite intoxicated and they fell and hit their mouth on that elevated edge of the bar, they wouldn't necessarily have to injure their nose, would they?

A. Well, such a fall would have to be almost parallel [62] to the edge of the bar. I can't visualize a person in that position but if a person did get in that position, that could happen, I suppose.

Q. Or, if a person was sitting at a stool and they lost their equilibrium through too much liquor and fell forward like that, banged their mouth on the edge of the bar, they could do that without injuring their nose, could they not?

A. A person sitting at a bar would be in a position where if he or she fell, the lacerations sustained would be more or less parallel to the line of the mouth and these were at right angles.

Q. They were up and down? A. Yes.

Q. Not across, they were not cut by the teeth then, Doctor?

A. Well, they probably weren't cut by a bite; could have been cut as, probably cut because the teeth were there forming a resistance.

Q. So, then would you, would you to any extent

(Testimony of Dr. Harvey W. Anderson.)

then, Doctor, change your testimony that this might have been occasioned by a fall, you said it couldn't have been occasioned by a fall in answer to Mr. Stevens' question. Would you like to change it now to it could have been occasioned by a fall?

A. No.

Q. Well, which is right, what you told us three or four or five minutes ago or what you tell me now? [63]

A. Repeat that, please.

Q. You say now that it could not have happened by a fall, it could not have happened she cut her mouth by a fall?

A. I think it would be unusual.

Q. Well, many unusual things happen in the medical profession, Doctor?

A. In all professions.

Q. In all professions, you are right, except ours. Now, Doctor, I believe in response to a question by Mr. Stevens, you stated that you went back to the Club Alibi to see Myrtle Cathey. I believe, on the 31st day of January, is that right?

A. The 30th.

Q. The 30th. Now, Doctor, would you state whether or not that Mr. Urban called you up in a few days after the first visit there and you in response to his telephone call told or phoned Mr. Williams at the Williams Drug and had him prepare a prescription for Myrtle Cathey?

A. That may have happened. I do not recall it.

Q. If we could bring that prescription down, Doctor, would it possibly refresh your recollection?

(Testimony of Dr. Harvey W. Anderson.)

A. It would help considerably.

Q. Now, in looking back, does that come to your mind now, Doctor?

A. I, this question has been brought out, asked in the inquest and I did check with the downtown druggists to see if [64] I had called anything and they said no. It just might be.

Q. I realize, I wasn't trying to trap you on this, Doctor, the fact that in your profession you are writing so many prescriptions, I just wanted it for the purpose of your recollection. Now, going back to the time that you talked with Mr. Urban at the Alibi Club on your first visit, did you ask Myrtle Cathey what had caused the bruises and lacerations? A. No.

Q. And I don't know whether, remember whether you stated what she was wearing at the time that you saw her the first time?

A. Well, I would——

Q. Did she have her street clothes on?

A. I remembered a bathrobe. I don't know whether it was the first time or the second time I was out there. I think, it is getting to be a long time ago, but I think maybe she might have had a T-shirt on, white T-shirt.

Q. Did she have a night gown, pajamas?

A. I don't think she had a night gown on.

Q. Well, would short-sleeved pajama top cause you to think she might have been wearing a T-shirt?

A. I recall her wearing a white T-shirt on one or the other of the two times I saw her alive.

(Testimony of Dr. Harvey W. Anderson.)

Q. That was on the 22nd?

A. The 22nd or the 30th.

Q. Oh, you did see her alive on the 30th, then, Doctor? [65]

A. Yes.

Q. At the Alibi Club? A. Yes.

Q. Oh, that's right, too. Oh, there was one other question I want to ask the Doctor before we quit. You stated in response to a question by Mr. Stevens that she had had a fight with some woman, that Myrtle Cathey said she had a fight with some woman?

A. No, she didn't say so. I asked Mr. Urban what had happened and that is what he told me.

Q. Now, Doctor, at the time that you went out there on the 30th day of January, did you feel any alarm for the condition, by reason of the condition of Myrtle Cathey?

A. Well, I thought she was critically ill and ought to be put in the hospital right away, which was done.

Q. And you say she was put in the hospital right away by Mr. Urban?

A. Either he called the ambulance or I did. If he did it, he did it on my instructions because I said we will have to call the ambulance and as I left they were coming up.

Q. Well, at that time, did you feel that death was eminent? A. I did.

Q. Now, Doctor, this convulsion you say that she had at that time, that was on the left side?

A. Yes. [66]

(Testimony of Dr. Harvey W. Anderson.)

Q. And is that usual if there is a brain injury on the right side it will effect the left side of the body?

A. That is the characteristic way.

Q. Characteristic? A. Yes.

Q. And would you say then, speaking professionally, that this convulsion was caused by the hemorrhage of the brain? A. I would, yes.

Q. Would you also say that death was caused by the hemorrhage of the brain?

A. I would say that death was caused by brain injury.

Q. Well, what other injury did you see other than a hemorrhage of the brain?

A. The hemorrhage is proof that injury has occurred and that is the only tangible part of it.

Q. In your experience, Doctor, have you ever had a case where there was an instantaneous breaking of blood vessels in the brain causing instant death, cerebral hemorrhage?

A. I haven't had a patient who died, but I have had many, not many but, oh, perhaps three or four patients who have had spontaneous brain hemorrhages. None of these happened to die. The mortality figure on such cases are high, however.

Q. Doctor, you have I believe you stated in response to a question some time ago that you had no opinion as to when that drainage of blood from the blood vessel in the brain commenced, is that right; you had no way of telling when that [67] started outside you say it was less than a month?

(Testimony of Dr. Harvey W. Anderson.)

A. I wouldn't be able to pinpoint it. It seemed relatively fresh.

Q. Well, just, I am going to try to get through, Doctor, just by five o'clock if we can. Now, you stated when you went to see Miss Cathey on the 22nd that she mumbled and kind of gruff and rough with you, you smelled the alcohol on her. Now, would you say, Doctor, that her actions, that her inability to logically express herself was caused strictly by the alcohol or could it have been alcohol and shock? A. She wasn't in shock.

Q. She was not in shock?

A. No, her blood pressure was normal, pulse was of a good quality. There is a medical entity, surgical entity which is called shock, but she could have been in concussion.

Q. Yeah, I was coming to that, if that could have been confused by reason of concussion?

A. She could have.

Q. Well, the combination of whiskey and concussion could possibly be the result of her inability to properly express herself?

A. I think one or the other or both in combination could account for her behavior at that time, but the fact that I was able to detect the odor of alcohol indicated that that one was present.

Q. What was her blood pressure at the time you took it, Doctor? [68]

A. Well, I can probably give a pretty good answer to this because I don't generally write any-

(Testimony of Dr. Harvey W. Anderson.)

thing much in between eighty, ninety. I go ten at a time on blood pressure. A professor once told me you can't get any closer that five points of being accurate. I recall hers as being one forty dysystolic and ninety systolic.

Q. Would that be normal for a person her age?

A. Well, perhaps slightly elevated.

Q. The alcohol either, recent?

A. Could well have been. I have noticed that it is almost impossible to get a normal blood pressure on fresh alcoholic.

Q. Doctor, can you state professionally whether or not that a person addicted to the heavy use of alcohol sometimes have cerebral hemorrhages?

A. I think that they would. Their chances for such a condition occurring wouldn't be materially greater than any other citizen the same ago.

Q. I don't think I quite got your answer. Would you repeat that?

A. I don't think alcohol is considered a contributory cause for brain hemorrhage.

Q. Well, I am not asking about the contributory cause. Is it not sometimes in the case of extremely heavy consuming of liquor the sole cause of cerebral hemorrhage?

A. Not to my knowledge. [69]

Q. Doctor, while you made an examination on January the 22nd, did you see much discoloration of the clothes of Myrtle Cathey, or of the bed from the menstrual flow?

A. Well, I don't recall the exact articles of

(Testimony of Dr. Harvey W. Anderson.)

clothing but I recall a certain amount of blood being present.

Mr. Taylor: I believe that is all, Doctor, for the present. Take our recess, Your Honor?

The Court: Is there any redirect?

Mr. Stevens: Yes, there is, Your Honor, but I believe it will be quite substantial now.

The Court: It is now five o'clock and you both wish to adjourn at this time. Members of the jury, once more I admonish you not to discuss the subject of this trial with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion until the case is finally submitted to you, and you are excused until ten o'clock tomorrow morning. Court will recess until that time.

The Clerk: Court is recessed until ten o'clock tomorrow morning.

(Thereupon, at 5:00 p.m., the trial of this cause was adjourned until May 18, 1955, at 10:00 a.m.)

May 18, 1955—10 A.M. Session

Be it remembered, that upon the 18th day of May, 1955, at the hour of 10 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented [70] by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Clerk: Court is now in session.

The Court: Let the record show the presence of the defendant and the attorney, Mr. Miller, and the government attorney. Will the clerk, please, call the roll of the jury?

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, Your Honor.

The Court: Parties ready to proceed?

Mr. Morgan: If the Court please, Doctor Anderson was to return this morning and I believe that Mr. Stevens is now determining if he has arrived or will arrive, Your Honor. When he does we will then be ready to proceed.

The Court: The defendant ready?

Mr. Miller: The defendant is ready, Your Honor.

The Court: I assume that Doctor Anderson was informed last evening or yesterday afternoon that he was expected to resume the stand at ten o'clock this morning.

Mr. Morgan: That is correct, Your Honor, he was.

Mr. Stevens: The Doctor has been to the hospital again. He is on his way this time. It will just be a few moments.

DR. HARVEY W. ANDERSON

the witness on the stand at the time of adjournment, resumed the stand for [71]

Redirect Examination

By Mr. Stevens:

Q. Doctor Anderson, yesterday on cross-examination, you told the Court in answer to one of Mr. Taylor's questions that in your opinion the hemorrhage on the brain of Myrtle Cathey was recent: could you tell us what you meant by that in terms of the time, recent?

Mr. Taylor: Just a moment, Your Honor. I think it has been answered.

The Court: He may answer.

Dr. Anderson: I recent, I meant that the clot having a loose organization that it was probably anywhere from an age of several days to possibly a week or two weeks.

Q. (By Mr. Stevens): And, Doctor, you were, you stated that the cause of that hemorrhage was some type of a broken blood vessel. Could you tell us the size of the vessels that were involved?

A. Well, the layer which hemorrhages in this kind of case is the arachnoid membrane and that is just full of small capillaries and venules which are almost microscopic.

Q. Then it would be unable of you to pick up a single vessel or to determine which single vessel or which vessels had broken, is that correct?

A. Yes.

(Testimony of Dr. Harvey W. Anderson.)

Q. Would you tell us the location of that blood clot in relations to the brain? [72]

A. The clot was on the surface of the brain, not in the brain substance, on the top of the brain.

Q. And you stated that it had considerable pressure when you opened the skull, was that correct?

A. When the outer fibrous layer, the dura mater was opened this bloody spinal fluid came out with a gush.

The Court: Just a moment. Yes, I believe counsel couldn't hear because of the distracting noise. Would you like to have the answer read.

Mr. Taylor: Well, either give it again or have it read. I didn't catch the answer at all.

Dr. Anderson: Well, when the dura mater, the first layer of the linings, the dura mater is considered the outer brain lining, and when this tough layer was opened the bloody spinal fluid came out with a gush. It came up about six of eight inches. It spurted up indicating a certain amount of tension, pressure within that closed space.

Q. (By Mr. Stevens): And what, in your opinion, would have been the result of that clot on top of the brain at a pressure building up like that?

A. What would have been the result?

Q. Or what was the result?

A. I think we all know the result. I mean, I feel that I know the result. I think this caused her, the death.

Q. And from the pressure behind the blood when you [73] took off the outer brain covering,

(Testimony of Dr. Harvey W. Anderson.)

did that medically indicate anything to you, the pressure of the blood itself?

A. No indication apart from the fact that the pressure was there and pressure in a closed compartment in itself is injurious, apart from the amount of blood. This bleeding into a closed space such as this never amounts to the hemorrhage, never causes danger from the standpoint of blood loss such as an intestinal tract hemorrhage or hemorrhage of a wound in the extremities. Then hemorrhage is dangerous from the standpoint of anemia and blood loss. Here the only factor is pressure in a closed compartment and that is the whole problem. Neurosurgeons and so forth in treating this kind of condition first seek to remove the pressure through burr holes, little drill holes in the skull so evidently they also are quite concerned with pressure per se.

Q. Do you have an opinion, Doctor, as to the length of time it would take that pressure to build up?

A. Well, the, it varies considerably. Some deaths in subdural hematomas do not follow for two or three months following the accident. It is extremely variable. It depends entirely on the rate of speed the blood is released from the broken blood vessels. Usually there are multiple small, tiny bleeding points rather than any one particular large vessel.

Q. Now, Doctor, I would like to call your attention to the evening of the 22nd of January, and ask you what were the color of the bruises that you

(Testimony of Dr. Harvey W. Anderson.)

have testified here about on the [74] body of Miss Cathey that time, that is the first time?

A. Yes, the first time I was there. I believe I answered that question once yesterday. The bruises were bluish, bluish red, black and blue appearance.

Q. And at that time, Doctor, did you have an opinion as to the relative age of those bruises?

A. Yes, the bruises on the face were associated with swelling. That indicates that they were recent, that is, within that day, that twenty-four period.

Q. And the bruises you described which were located in or near the mastoid process, did you have an opinion as to the age of those bruises?

A. I didn't consider them separately.

Q. Does your testimony then pertain to all the bruises you examined or noticed that day?

A. All the bruises about the head, yes.

Q. You mentioned some shin bruises that you noticed, were those also of recent origin when you saw them on the 22nd?

A. I am not clear that I made any official comment on the shin bruises on that date. I may have said something about those at the time of the autopsy. They were older in character.

Q. They were older in character?

A. I did admit yesterday that this examination of the 22nd wasn't thorough-going. I thought it was adequate but it wasn't thorough-going and detailed. It covered the essential [75] points, but I don't believe that I could truthfully state that I paid any

(Testimony of Dr. Harvey W. Anderson.)

attention to shin bruises on the 22nd. I did check the legs for fracture.

Q. Doctor, I believe yesterday in answer to one of Mr. Taylor's questions you stated in effect that spontaneous hemorrhage can develop similar to the hemorrhage that you found on the brain of the deceased. In your opinion was this a spontaneous hemorrhage?

A. I never gave it an opinion. This finding is so much more common with head injury that I linked it up logically in those terms. In my opinion it was not a spontaneous hemorrhage. It would be an extremely rare coincidence if it were, although it could have been.

Q. Doctor, the location of the clot as you stated, incidentally, you stated it was about that size, did you not?

A. I would say it would be, oh, three by four inches, more oval shaped.

Q. Thank you, and that was located you said on the right central portion of the brain?

A. Superior, be the parital surface anatomically, but geographically I call it the top on the right side.

Q. Was there any evidence of any type of wound above that surface on the skull? A. No.

Q. Doctor, is there medically an explanation for the appearance of a hemorrhage of this type in a position where [76] there is no apparent direct connection with a blow, or a result of a blow?

A. You mean external scalp injury in that point?

(Testimony of Dr. Harvey W. Anderson.)

Q. Yes.

A. Because the entire inner table of the skull was, had an innocent appearance. Yes, the location of clots is often at the side opposite from injury. It seems as if the inertia of the brain on the skull being forced suddenly will not cause injury until the end of the blow. That is, there is a rebound of the relatively soft brain substance within the firm skull encasement so it may be, vision a plate full of jelly taking a transverse motion. It may be that the end of that motion causes more injury than the onset of that motion and that is, that is called a *contrafissura* type of injury wherein the damage is at a point opposite from the point of impact.

Q. Then the point of impact, if that principal was involved in this case, would have been on the left side of the cranium?

A. Yes, if that principal were operative that certainly would be. There is no reason to assume that it had to be operative. There were blows on both sides, the fact that hemorrhage was where it was does not in any sense constitute a mystery from a medical point of view. Typically that often will happen *contrafissura* injury.

Q. Another matter, I believe you stated that as you made [77] your incision you cut through the temporalis muscles, is that correct? A. Yes.

Q. And were those the muscles that you described as having hemorrhages in them?

A. Yes.

Q. And the hemorrhages that were apparent——

(Testimony of Dr. Harvey W. Anderson.)

Mr. Taylor: Just a moment, Your Honor, I am going to object to leading questions. I think that the Doctor should be allowed, should do the testifying in this case.

The Court: Overruled.

Q. (By Mr. Stevens): What I am getting at, Doctor, could you straighten out for us when the apparent misunderstanding of counsel concerning the hemorrhages in the area surrounding the mastoid process, did you discover hemorrhages in that area?

Mr. Taylor: I wonder if counsel would have the Doctor point out those particular area that Mr. Stevens has mentioned so we will know what he is talking about.

Mr. Stevens: Yes, that will be fine.

The Court: Very well.

Dr. Anderson: The desire is to point out the areas of the hemorrhages?

Q. (By Mr. Stevens): Yes, it was my understanding that Mr. Taylor was under the impression that you, while you were incising, passing [78] through the mastoid area discovered a hemorrhage, was that true?

A. Not quite. There were several hemorrhages here. There were cutaneous hemorrhages in the mastoid process area on either side. Those were the external, visible hemorrhages and those were not cut through except in the upper part of that area that was stained, it was cut through because that would be the level of the incision into the vault, but the

(Testimony of Dr. Harvey W. Anderson.)

invisible hemorrhages were those in the temporalis muscles in an area of the scalp, external area didn't appear to have any bruises but there were considerable hemorrhages within the body of these two flat fan-shaped muscles which occupy a considerable area of the head. If you just want to bite down hard you can feel the action of that muscle.

Mr. Taylor: Are you pointing to those muscles now?

Dr. Anderson: Yes, an area right there.

Q. (By Mr. Stevens): About the size of your hand, Doctor?

A. Well, this whole side of the front of your head from the ear forward is occupied by that muscle and these muscles on both sides had hemorrhages, a finding which is strictly by coincidence in the course of entering the skull these muscles have to be traversed.

Q. You also used the word ecchymoses yesterday in relation to the mastoid process. Could you tell us, is that the same that you have described these cutaneous hemorrhages? [79]

A. Yes, those are synonymous terms. Ecchymoses means capillary hemorrhage into the skin. It causes a smooth uniform discoloration without swelling as distinct from a rash, skin rashes of measles are also capillary hemorrhages. There the spots are small and discreet. Ecchymoses is considered to be a flat, smooth more or less homogenous discoloration of localized cutaneous hemorrhage as distinct from a generalized process such as

(Testimony of Dr. Harvey W. Anderson.)

a measles eruption. That is the application of the term ecchymoses, local.

Q. Going back, Doctor, to the subdural hematoma, could you tell us if you can, or if you did make any apparent connection between any portion of the visible injury on this deceased and the cause of the death, that is the hematoma, any direct connection?

A. My opinion the hematoma could have been caused by, by the blows behind either ear, evident blows to either side of the head, or any of the facial wounds. I would possibly discount the lip lacerations as being an operative factor because there is a certain give and take to the mandible which would tend to cushion it, but the mandible is the only flexible bony structure in the adult skull so with that exception I would think that any blow from the upper teeth on up, any of those blows on the skull could have been the ones.

Q. Well, then, going back to the 22nd, Doctor, of January, when you saw Miss Cathey at the Alibi Club with the visible bruises, were those bruises—will you strike that, [80] please. Could you connect the bruises which you observed on the 22nd with the injuries that you have reported through the autopsy? A. Yes.

Q. And how would that be?

A. For one thing the bruises were still present at the autopsy particularly the lacerations and the discolorations behind the ears, and as I have al-

(Testimony of Dr. Harvey W. Anderson.)

ready pointed out, the subdural hemorrhage could have been caused by, and it is perfectly consonant with any of the injuries to the solid part of the skull.

Mr. Stevens: Thank you, very much, Doctor. Your witness, Mr. Taylor.

Recross-Examination

By Mr. Taylor:

Q. Doctor, when you left here last night you realized you were coming back this morning to resume the stand? A. Yes.

Q. After leaving the court room last night did you talk with anybody about this case, or did you consult any medical books regarding it?

A. I did not consult any medical books. I was in the District Attorney's office for approximately a half an hour.

Q. Doctor, was it the result of that talk with the District Attorney that you changed your testimony from the fact that yesterday you testified that this hemorrhage could [81] have been going on for a month. Now, this morning you have got it down to a week, was it a result of that conversation you had in the District Attorney's office the cause of you changing your testimony?

A. I don't believe my testimony is materially changed and we did not discuss that particular topic.

Q. Well, three weeks change would be quite a radical change, wouldn't it, Doctor?

(Testimony of Dr. Harvey W. Anderson.)

A. With Methuselah, no. Perhaps with this kind of a thing where you are trying to pinpoint something, yes. I don't believe I gave any answer stating affirmatively stating that this hemorrhage was of one month duration.

Q. You said that it could be from one month down to a few days before?

A. Well, that may be right because I do have experiences with clots older than one month and I recall how they look.

Q. Then you know in this particular case it was over a week although you brought it down to one week in your present testimony you know that it is nine days, don't you, from the 22nd to the 31st?

A. 22nd to the, yes, approximately nine days, yes.

Q. So then taking your testimony this morning then that a couple of days after you first called on Miss, to treat Miss Cathey she got another beating, is that right?

A. I would hardly say so. I only pretend to state with regard to the duration of the clot, that it was not organized [82] and could be anything less than a month in duration.

Q. Then yesterday when I questioned you as to the size of the capillary blood vessels that was broken, you stated you did not know how large they were, but this morning now you describe them; was that by reason of any study you made last night?

(Testimony of Dr. Harvey W. Anderson.)

A. No, I haven't made any studies since we last parted.

Q. Well, you stated in response to a question by Mr. Stevens that the result of the, that the result of this hematoma of the brain was the direct cause of death, is that right? A. Yes.

Q. And you say that any one of four or five different points it indicated a blow could have caused the death? A. Yes.

Q. Could have caused this hematoma and then I think your testimony then, Doctor, would it be possible for a blow that was received three weeks prior to that time to have been the cause of death?

A. Yes.

Q. Now, Doctor, could you state what particular functions are controlled by that part of the brain in which this hematoma on Myrtle Cathey was located?

A. That is the parietal, the right parietal area has to do with sensation, sensory phenomena, the left of the body.

Q. What if any effect would it have on speech? [83] A. Very little.

Q. Eyesight? A. Pardon?

Q. Eyesight?

A. Eyesight. The vision is controlled, the vision impulses are interpreted in the occipital part of the brain, which is the extreme posterior portion and that would not be effected.

Q. What would you say that word was?

A. Occipital.

(Testimony of Dr. Harvey W. Anderson.)

Q. Point at it, will you, and then your sense of balance is below that, is it not?

A. The sense of balance is in the cerebellum which is a different compartment altogether, yes.

Q. But is is lower down, a little lower down than what you pointed? A. Lower down.

Q. Would that hematoma have any effect upon the ability of Myrtle Cathey to walk?

A. Well, that is something it would be nice to ask her about. I couldn't say for sure. I would think that the concussion, any injury to produce, sufficient to produce that amount of bleeding would certainly impede ones walking ability.

Q. Now, if the evidence would show in this case that throughout the, following your visit to the Alibi Club, your first visit there that this deceased did walk around and carry [84] on her usual occupations, cook, would you say that was possible with that type of hematoma and the location?

A. I would say that a person developing a hemorrhage of that sort would have a severe headache and would be incapacitated thereby.

Q. Then if she didn't have the headaches, Doctor, and was not incapacitated, it could possibly be then a spontaneous hematoma?

A. I didn't catch the connection there at all.

Q. Well, you say that a person having a concussion that would create that condition, that hematoma on the brain and carry it around for a period of nine days, they would have headaches, difficulty in locomotion, walking around the place, and if the

(Testimony of Dr. Harvey W. Anderson.)

evidence showed she had no difficulty of locomotion, carrying on her customary duties and had no headaches during that period, would it indicate possibly indicate that this might have been a spontaneous hemorrhage?

A. It might indicate, if it could be shown that she was symptom free and able to be about her duties during the week prior to death, it would indicate that in my estimation that at least no significant amount of bleeding had occurred until later on in the week.

Q. Or possibly none, is that right?

A. Possibly none.

Q. Now, Doctor, you have used, in answering some of Mr. Stevens' questions this morning about some matters that we went into yesterday, according to my notes yesterday you said [85] in response to a question as to the appearance of the bruises back of the ears, you say that the first time that you saw those they were not discolored, they were just swollen, is that right? A. No.

Q. What?

A. No, the bruises which were just swollen only were those of the malar eminence, the cheek bones and the nose.

Q. By what I meant discolored, you said they had a reddish appearance instead of a black or a blue?

A. I noticed a reddish bluish discoloration behind the left ear.

Q. But the other place, points of blows where violent contact had been made upon the body of

(Testimony of Dr. Harvey W. Anderson.)

Miss Cathey were deeper in color, were they not, blue or purplish?

A. Oh, I don't know that there was any changes there in colors. I believe the one over the nose there where she had considerable swelling was of a deeper blue indicating perhaps more hemorrhage within that tissue.

Q. Well, Doctor, from your own recollection, could you state how many bruises that the deceased had on her from her lips down to her feet, the lower extremities?

A. I could give you a fairly close idea of how many bruises she had on her head. I couldn't—

Q. No, no, we are not talking about the head, Doctor. I want from the hips down. [86]

A. Hips down?

Q. Yes.

A. No, I couldn't give you an accurate—

Q. Well, isn't it a fact there were a lot of bruises, small bruises about that big in addition to one large bruise on the hip from the hips clear to the feet?

A. Well, I said before I didn't make a careful appraisal of the leg bruises.

Q. Well, did you make any appraisal of the leg bruises at the time you performed the autopsy on the 31st of January? A. Yes.

Q. Could you tell from that autopsy how many leg bruises she had?

A. They were not counted. They were numerous, numerous small bruises.

Q. Numerous small bruises?

A. Yes.

(Testimony of Dr. Harvey W. Anderson.)

Q. Now, Doctor, what in your opinion would cause numerous small bruises upon her legs?

A. These were mainly on the legs which is from the knee down and I would think that bumping into furniture, ordinary shin bruises would account for the majority of those. I don't recall there being any bruises on the feet. She had a lot of shin bruises such as we all tend to acquire.

Q. That the only, that the only diagnosis you have in mind at the present time as to what might cause those bruises? [87]

A. I think it is quite likely that she could have struck her legs as a result of falling down after being hit by whatever object she was hit with on the head.

Q. Well, now, Doctor, could those small bruises be the result of being down and being kicked numerous times by persons wearing a small shoe like a woman's shoe? A. Possibly.

Q. So that many things could have caused those bruises, is it not, Doctor?

A. The leg bruises?

Q. Yes. A. Yes, sir.

Q. I think, possibly, the category of reason for those bruises would be enlarged many times over what you and I have dredged out of our minds at the present time, eh? A. Could well be.

Q. Now, on the 31st when you performed the autopsy and removed the top part of the skull, had those mastoid process bruises changed in color from what they were on the 22nd? A. Yes.

(Testimony of Dr. Harvey W. Anderson.)

Q. They had got a deeper blue or purplish color?

A. Definite dark purple discoloration.

Q. And they had lost their reddish tinge, had they not, by that time? A. Yes.

Q. Now, Doctor, would you tell this jury what particular [88] location which indicated that a violent force had been applied to, of which I think you mentioned five, caused the hematoma of the brain?

A. The question was, which of the five do I think caused it?

Q. Yes, sir.

A. I don't think any one particular, I couldn't point out any one particular one as being——

Q. Now, did any of the bruises that you mentioned on the body or on the legs contribute in any way whatsoever to the death of Myrtle Cathey?

A. I hardly think so.

Q. You used the word ecchymoses?

A. Yes.

Q. You use that, you use it interchangeably with hemorrhage or hematoma?

A. Not with hematoma. It is used interchangeably with cutaneous hemorrhage.

Q. Now, you say that, that ecchymoses is not accompanied by swelling, is that right, it is bluish, it takes on a certain dark color without swelling?

A. That is the use of the term is to imply cutaneous hemorrhage without, without surrounding swelling. Then if there is surrounding swelling then you are obligated, for accuracy's sake to use the term contusion.

(Testimony of Dr. Harvey W. Anderson.)

Q. Well, now, for instance, if a person got a sufficiently [89] hard blow that caused his eye to swell shut and caused it to be discolored, would that be ecchymoses or would it be contusion or would it be hematoma?

A. That would be contusion with ecchymoses.

Q. Be what?

A. Contusion with ecchymoses. You have ecchymoses without contusion and in a bony prominent such as the ear there is no underlying tissue in the way of muscles or tendons there for swelling to occur. In the perio-orbital, around the eye, there are lots of soft tissue and fat protecting the eyeball and that is why a black eye is such a favorite clinical finding.

Q. Now, I believe you stated yesterday that you made an exploratory search of the vital organs of the body? A. Yes.

Q. Heart, lungs? A. Yes.

Q. Did you examine the contents of the stomach? A. No.

Q. Why not?

A. I did an external examination of the stomach, that is palpated it, didn't feel any.

Q. Was there food in it? A. Pardon?

Q. Was there food in it?

A. I could not feel any contents whatever. [90]

Q. Did you learn of her eating shortly before she went to the hospital? A. Did I learn of it?

Q. Yeah? A. No.

Q. Now, what time was it you got out there,

(Testimony of Dr. Harvey W. Anderson.)

about nine-thirty, ten o'clock on January the 22nd?

A. On the 22nd?

Q. No, the 30th? A. The 30th?

Q. The 31st, what time did you go to the funeral parlor?

A. That was about four-thirty or five in the afternoon.

Q. Four-thirty or five, how long was that after her death?

A. Well, her death was at one-thirty, I believe.

Q. In the morning?

A. In the morning, so that would be fifteen hours.

Q. Now, if she had had a feed of hamburger and gravy on the evening of the 30th, it would, would that have still been in the stomach?

A. No. Emptying time of the stomach is anywhere from a half hour.

Q. What?

A. The emptying time of the stomach is relatively short, about a half-hour to an hour. If you have an ulcer and get a little bit nervous it might be two hours. [91]

Q. What did you say about ulcers, Doctor?

A. Well, an ulcer or any condition that might promote a pylorus spasm, a constriction at the end of the stomach.

Q. Did this deceased have ulcers?

A. Not that I could tell.

Q. So then if this deceased had then eaten some

(Testimony of Dr. Harvey W. Anderson.)

hamburger the previous evening it would have passed out of the stomach?

A. It would have been in the small intestine somewhere.

Q. Did you look in the intestines to see what food intake had been? A. No, I did not.

Q. Now, did you look at your records, Doctor, to ascertain whether or not you had prescribed anything for Mrs. Cathey a few days after your first visit to her?

A. I checked with the girls down at our office to see if we had a card on her and we didn't have one, and I have, several weeks ago checked with the pharmacists I usually trade with down town and asked them, that is Fentons and Lacey Street Pharmacy and the Northward and they didn't have any prescriptions.

Q. What name did you give to Miss Cathey at the time that you entered her in your records?

A. The only record I would have of her would be the hospital record.

Q. Did you have her sent to the hospital under the name of Martha Kelly? [92]

A. I don't recall.

Q. You don't recall whether you entered her then under the name of Martha Kelly or not?

A. I usually leave it to the hospital staff to, to obtain the patient's name.

Mr. Taylor: I would like to have this marked for identification.

The Clerk: Defendant's Identification A.

(Testimony of Dr. Harvey W. Anderson.)

(Small bottle of medicine was marked Defendant's Identification A.)

Q. (By Mr. Taylor): I will hand you Plaintiff's or Defendant's Identification A and ask you to state, if you can, what that is?

A. This is a sodium seconal, grain and a half sleeping pill. It might be a substitute company because the Lilly Company has the patent on this and they have since changed their design. Quite a few companies making it now because a seventeen year patent expired. It is either sodium seconal or Lilly, or sodium secobarbitol by Nico. They have all found a very productive line of work.

Q. Now, Doctor, after looking at the identification, Defendant's Identification, have you any recollection of phoning that prescription to Doctor Williams, not Doctor Williams, I mean druggist, George Williams? A. George Williams.

Q. George Williams. [93]

A. My recollection at best is vague. I do not by any means deny it because at the inquest also I left that open. I do not recall clearly one way or the other if I did or did not prescribe for the deceased.

Q. You don't know whether you did or not then, is that right? A. No, I do not.

Q. Do you believe from the fact that this label has your name on it, would you believe that that prescription was put up by Mr. Williams pursuant to a request by you over the telephone?

(Testimony of Dr. Harvey W. Anderson.)

A. It is probable but not altogether a sure thing, because he manages to get out quite a few prescriptions there which have no authorization. However, again I do not deny it by any means. If this was in Mr. Urban's possession I daresay that I am the one who filled it, and I do order this particular drug frequently.

Mr. Taylor: May we have the recess now, Your Honor.

The Court: It is past eleven. We will take a recess, and members of the jury, once more I admonish you that it is your duty not to discuss this case with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of the trial; and neither from nor express any opinion until the case is finally submitted to you. We will take a ten minute recess.

The Clerk: Court is recessed for ten minutes. [94]

(Thereupon, at 11:05 a.m., the Court took a recess until 11:15 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record again show the presence of the defendant and his counsel.

Mr. Taylor: We will stipulate, Your Honor, that the jury is all present.

Mr. Stevens: We will also stipulate.

The Court: Thank you, gentlemen. You may proceed.

DR. HARVEY W. ANDERSON

the witness on the stand at the time the recess was taken, resumed the stand.

Mr. Taylor: That is all our questioning of this witness at the present time.

Redirect Examination

By Mr. Stevens:

Q. Doctor, in regard to this time on the idea of the recent hemorrhage, if a hemorrhage had been in existence for three weeks as Mr. Taylor suggested and a hemorrhage of the size and with the pressure that you observed, would there have been symptoms of that present in the deceased before she died? A. Yes, I believe so.

Q. And would that have been over a period of time? A. Probably.

Q. Now, Mr. Taylor asked you concerning certain [95] symptoms such as the ability to walk and the effect of eyesight of the hematoma itself; were your answers confined to the results of the hematoma itself or did you include in your answers your knowledge of the fact that a severe injury had been inflicted also on this person?

A. Well, I implied that any brain which has been injured enough to cause surface hemorrhage would also have a certain amount of concussion and that not only caused confusion but difficulty in walking, difficulty in vision. People often have trouble with vision with concussion, so it is difficult to actually

(Testimony of Dr. Harvey W. Anderson.)

separate the effect of the concussion from the hemorrhage.

Q. Taking into consideration all of the injuries and the hematoma also, would you have an opinion as to the effect on the loss of speech, loss of speech as an effect of those injuries in this deceased?

A. Well, if the patient were right-handed the speech sense would be in the temporal lobe, the left side and I would think there would be a minimal, if any effect on the speech center. Terminally, of course, she was unconscious and then there was depression of all the brain functions.

Q. In this type of an injury could the effect have been a gradual effect from the time of the injury to the time of death? A. Could have.

Q. Do you have an opinion as to that in this case, Doctor? [96]

A. I couldn't give a clear cut opinion. It could be either way.

Q. You mean the clot itself could have developed slowly or could have built up all of a sudden in this case, is that correct?

A. Yes, it could have been a daily slow release of blood; it could have been, it could have been a release within the last few days of her life. The fact that the spinal fluid was bloody and that there was a clot, too, indicated that some of that blood had been present longer than the rest of the blood. I will say this, that in a well organized hematoma which has been present for several months that there is no blood in the spinal fluid at all, only a slight

(Testimony of Dr. Harvey W. Anderson.)

yellow staining of the spinal fluid, so that I believe that we had here a slightly old process and then a recent process; if this thing had happened several months ago I would think that the blood loose in the spinal fluid could have hemalized and left only a yellow stain and that the remainder of the clot would have been more organized, but here we had a relatively loose clotted material and then free blood in the fluid.

Q. Doctor, is the hematoma itself a cause or an effect in relation to the body system? I mean we speak of a spontaneous hematoma, but would it really be spontaneous in itself?

A. Spontaneous hemorrhage?

Q. Yes.

A. Usually there is a prior cause to most spontaneous [97] hemorrhages. Spontaneous subarachnoid hemorrhage of which I spoke yesterday is generally due to a small aneurysm in one of the arteries rupturing, so you can argue then that if the aneurysm weren't there then this spontaneous event would not have occurred. There was prior pathological basis for the phenomena. Spontaneous refers, I think, perhaps more to the fact that it happened without any injury. A person who without knowing that he had an aneurysm, a spontaneous cause as far as can be determined.

Q. Spontaneous then in relation to exterior force or injury, is that correct?

A. Yes, and there are spontaneous subarachnoid

(Testimony of Dr. Harvey W. Anderson.)

hemorrhages without aneurysm, without weakness in the vessels.

Q. Would some type of condition be necessary to, a condition precedent to that development?

A. Not necessarily. These things will occur more frequently in people with high blood pressure.

Q. Well, Doctor, this bottle, do you have any independent recollection of ever calling Pat Cathey, Martha Kelly?

A. This bottle is probably, is probably my prescription, because it is a drug I order and I call Williams frequently and I, I did not, I know the first time I went out there I didn't have a clear-cut idea of what her exact name was. Mr. Urban was rather distraught and I could see that I had plenty of work cut out for me there, so I just went about and did it so I really didn't pay too much attention to what her name was. [98] This Kelly, you see, Kelly and Cathey, it is two syllables, they start with a hard "c" or "k." It is a similar name and I dare say that this prescription is mine.

Mr. Stevens: No further questions.

Recross-Examination

By Mr. Taylor:

Q. Doctor, wouldn't a hemorrhage or a hematoma of the brain both be a result and a cause, would it not, it might be the result of an injury and it would be the cause of death?

A. Result of injury, yes, and the cause of pressure at least causing death.

(Testimony of Dr. Harvey W. Anderson.)

Q. Is it the hematoma itself or the hemorrhage that causes death, or is it the pressure that is built up by the fact that there is a blood, blood is building up pressure upon the brain?

A. It is pressure continually leaking into a closed space without an outlet.

Q. Now, also, if a person received a sufficiently hard blow on the cranium or the head so that, so that the cranium depressed the skull down against the brain but did not break the lining of the brain or induce any hemorrhage there, it would still cause practically the same symptoms here as you described here, would it not?

A. A depressed skull fracture?

Q. Yes.

A. It could. In a skull fracture, however, you have the [99] good possibility of a different type of hemorrhage, that is a hemorrhage outside the dura in a case of that sort life may be lost due to blood loss itself independent of brain injury.

Q. If there was a severage of the ascending aorta that would cause instantaneous death, would it not?

A. It certainly would. That is in a different part of the body.

Q. That would be one type of body that in fact would not create any injury to the brain except it would take the blood away from it and death would ensue immediately?

A. Well, severance of any major artery will cause death in a short time.

Q. Now, in your practice have you ever run

(Testimony of Dr. Harvey Anderson.)

across any cases of instantaneous cerebral hemorrhages in which there was no exterior indication of blows or bad health? A. Yes, I have.

Q. Well, now, Doctor, now you have kind of pinpointed this because of this hematoma down on to the violent pressure applied to the various parts of the head. I think you said in the back of the ears and others. If those had been caused by fall, would the result be the same? A. Absolutely.

Q. I didn't quite follow your remarks in regard to the discoloration of the spinal fluid, you took a sample of the spinal fluid, did you not, Doctor?

A. No, just looked at it. There was plenty of it there. [100]

Q. Now, as long as there would be a bleeding into the brain would that cause a discoloration of the spinal fluid, give flecks of blood in it?

A. Bleeding into the brain?

Q. Yeah.

A. That probably would. This was all surface bleeding.

Q. And then as long as there was a bleeding there why there would be discoloration of the spinal fluid, is that right? A. Yes.

Mr. Taylor: I believe that is all, Doctor.

Mr. Stevens: Thank you very much, Doctor.

(Witness excused.)

MAYBELL BRAY

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Miss Maybell Bray.

Q. And where do you live, Miss Bray?

A. 1402 Lathrop Street.

Q. And that is here in Fairbanks?

A. Yes.

Q. What is your occupation?

A. I am night supervisor at St. Joseph's [101] Hospital.

Q. And are you also a nurse?

A. Yes, I am.

Q. Were you a nurse at the hospital on the 30th of January of 1955? A. I was.

Q. And were you ever connected with a patient known as Myrtle Patricia Cathey?

A. Yes, I admitted her in the hospital.

Q. Is that the name by which you admitted her to the hospital?

A. Yes, I believe so. Cathey was the last name I know.

Q. And do you remember the time that you admitted her?

A. Well, I don't know if I remember exactly. It was near ten o'clock, I believe, somewhere around ten, might have been——

(Testimony of Maybell Bray.)

Mr. Taylor: A.m. or p.m.?

Miss Bray: It was on the p.m.

Q. (By Mr. Stevens): And were you present when she was admitted? A. Yes.

Q. Did you make an observation of her condition at that time? A. Yes, I did.

Q. Could you tell us what was her condition at that time?

A. Well, she appeared——

Mr. Taylor: Just a moment, your Honor, I believe [102] we are going to object. I don't think the proper foundation, qualifications of this witness as to diagnosis of a party upon admission has been sufficiently shown.

The Court: She may state what she observed.

Mr. Stevens: Yes, we have no intention of going into any diagnosis.

Q. (By Mr. Stevens): Just your observations, please.

A. Well, she didn't appear very good. I thought she appeared poor.

Q. Was she conscious or unconscious?

A. She appeared to be unconscious.

Q. Was there anyone with her at the time?

A. Yes, Mr. Urban was with her. He brought her in.

Q. Do you recall having a conversation with Mr. Urban at that time, just yes or no, did you?

A. Yes.

Q. And was that approximately the same time

(Testimony of Maybell Bray.)

that you admitted her somewhere around there, do you remember when it was?

A. Yes, when I admitted her.

Q. Was there anyone else present at that time?

A. No.

Q. Would you tell us the conversation you had with Mr. Urban then?

A. Well, I believe I asked him what happened and he said [103] that she, some woman had beaten her up, something like that.

Q. Did you notice any particular area of injury on the woman?

A. Yes, there was one bruise behind her ear, large bruise.

Q. And did any part of your conversation with Mr. Urban pertain to that bruise? A. Yes.

Q. And was that the same conversation?

A. No, it wasn't.

Q. Was it at a later time?

A. Later time, yes.

Q. How much later, Mrs. Bray?

A. Well, it is hard for me to remember exactly, but——

Q. The same evening?

A. The same, well, see, she was admitted around ten some time and then it was later in the evening this happened.

Mr. Taylor: Would you speak up just a little louder so we can hear you?

Miss Bray: It was later, this other conversation.

Mr. Taylor: Later than what?

(Testimony of Maybell Bray.)

Mr. Stevens: Just a minute, please, Miss Bray. I am questioning you now. Mr. Taylor will ask you later. That is sufficient for my purposes.

The Court: Maybe you can use the [104] amplifier.

Q. (By Mr. Stevens): It was later the same evening after you admitted her some time around ten o'clock, is that correct?

A. I believe so.

Q. And where did the conversation take place, the second one?

A. I believe it was near the chart desk, third floor. No, I'm sorry. I would like to change that. I believe it was in the room, the patient's room.

Q. And was Mr. Urban in the room?

A. Yes.

Q. And was anyone else there besides Mr. Urban?

A. Well, there was another patient in the room. She may have been sleeping.

Q. What was the conversation at that time as it pertained to this one area?

A. Oh, it was this bruise. I asked him about it and he said that she fell off a bar stool.

Q. Do you know how long Miss Cathey was there in the hospital?

A. Well, I don't remember. She expired, I believe, about, between, maybe it was one, or one-thirty. I'm not sure.

Q. That was the following morning?

A. Yes, it was the following morning. She was

(Testimony of Maybell Bray.)

admitted, the following morning after midnight, you see, one, one-thirty in the morning. [105]

Q. Any treatment given to her at that time?

A. Yes, there was treatment.

Q. Did you have supervision over that treatment? A. Yes, I did.

Q. Would you tell us what it was?

A. Well, she had, she had intravenous fluid and she had the orders the doctor had written or doctor had called in and she was suctioned. She had mucus in her throat and was suctioned, I remember.

Mr. Stevens: Thank you very much. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. That is Miss Bray, or Mrs. Bray?

A. Mrs., Mrs. Bray.

Q. Mrs.? A. Mrs., yes.

Q. How long have you been working at St. Joseph's Hospital? A. I believe two years.

Q. And I believe you stated about ten o'clock on the night of January the 30th, or 31st, the patient came into the hospital?

A. I believe so. I don't remember the date exactly but I believe it must have been. I haven't looked at the records.

Q. Have you got the clinical chart with you, Mrs. Bray? [106]

A. No, I haven't. I don't have access to those.

Q. Now, you stated in response to a question by

(Testimony of Maybell Bray.)

Mr. Stevens that she appeared not good and then you change it to she appeared poorly. Would you kind of elaborate on what you meant by that?

A. I think that means about the same. I would interpret it to mean about the same.

Q. I mean, what caused you to form an opinion that she appeared poor, what led you to say that?

A. By her appearance, her symptoms, she appeared to be unconscious.

Q. Because of the bruises?

A. No, not because of bruises, but because she appeared to be unconscious and her pulse was poor and so forth.

Q. What was her pulse, do you remember?

A. I don't remember but the quality, it is not all, by the quality of her pulse.

Q. And from that did you feel that the, that death was eminent?

A. Well, one can never be sure, but——

Q. No, I mean just from your work around hospitals and possibly seeing people in like condition, did you think her end was near?

A. I thought she was poor and that is about all I thought. You just, you never know. You wait and see.

Q. Did she ever utter any words that you would understand? [107]

A. She did not.

Q. Now, you say that a doctor had called, which doctor was that?

A. Doctor Anderson.

Q. And when did he call?

A. He called in orders.

(Testimony of Maybell Bray.)

Q. Called in what? A. Orders.

Q. Alters? A. Orders for the patient.

Q. Oh, he called in orders? A. Yes.

Q. And did Doctor Anderson come over to the hospital later?

A. Yes, he came about the time she expired.

Q. That was about one-thirty in the morning?

A. Yes, I called him, I believe twice before that period, about the patient.

Q. Did you get him on the phone?

A. I did.

Q. And what did you say to him?

A. Well, I told him about the patient's, what I thought was the condition of the patient.

Q. So then he came over about the time that Miss Cathey passed away; is that right?

A. That's right. [108]

Q. Now, when Mr., when you asked Mr. Urban about the discoloration on her head, will you point out on your own head where that was?

A. It was either, I am not, I can't remember whether it was right or left of her head behind the ear on one side of the head.

Q. And what was the appearance of that?

A. Well, it was a large bruise, discolored area.

Q. What would you say as to the swelling?

A. I didn't notice any swelling.

Q. Didn't notice any swelling? A. No.

Q. And was it blue, purplish?

A. Yes, it was just, the skin was discolored.

(Testimony of Maybell Bray.)

Q. And in response to your question as to what caused it, you said he said she fell off a bar stool?

A. Yes.

Q. Did he say when? A. No.

Q. Did he say where? A. No.

Q. Was that the extent of the explanation given by him? A. I believe so.

Q. Now, you mentioned some treatment that you gave to Miss Cathey; just what was the extent of that treatment?

A. Well, she; just what I said before, she had I.V. fluid. [109]

Q. What is that?

A. It is an intravenous fluid into the veins.

Q. Oh, I see.

A. And she had, she seemed to have a lot of mucus in her throat. She was suctioned.

Q. You draw it out with a tube?

A. Electric suction, otherwise they choke on it.

Q. That interfering with her breathing, was it, that mucus in the throat?

A. Well, no, I don't think so. It could if it got into the trachea, it could.

Q. Allowed to accumulate it would be serious, would it not?

A. If it wasn't drawn out, it would be.

Q. So then you did everything you could at that time to relieve the patient? A. Yes.

Q. Who give the, who entered the cause of death on your clinical record over there, Mrs. Bray?

A. I suppose Doctor Anderson. He came over

(Testimony of Maybell Bray.)

and pronounced her. I suppose he signed the death certificate.

Mr. Taylor: That's all. Thank you, Mrs. Bray.

Mr. Stevens: Thank you, Mrs. Bray.

(Witness excused.)

Mr. Stevens: Call Mrs. Osborne. [110]

ESTHER OSBORNE

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you tell us your name, please?

A. I am Esther Osborne.

Q. And where do you live?

A. Ladd Air Force Base.

Q. It is Mrs. Osborne, isn't it?

A. That's right.

Q. Where do you work, Mrs. Osborne, if you work?

A. St. Joseph's Hospital.

Q. And were you working over there in January, this year?

A. Yes, I was.

Q. Are you a registered nurse, Mrs Osborne?

A. Yes, I am.

Q. And did you have any connection with Myrtle Patricia Cathey while she was there in the hospital?

A. I was on duty the night that she died.

Q. And do you recall seeing any other person

(Testimony of Esther Osborne.)

around the evening she was there, the night she was there?

A. There was a gentleman, I believe, that sat with her.

Mr. Taylor: Just a little louder, please.

Mrs. Osborne: There was a gentleman who stayed with here while she was a patient. [111]

Q. (By Mr. Stevens): Do you know who that was?

A. Later I found out his name was Mr. Urban.

Q. Did you have a conversation with him pertaining to Mrs. Cathey at any time that evening?

A. I remember that when I first made rounds I asked him what had happened to her?

Q. Do you remember about what time that was?

A. Somewhere between eleven-thirty and twelve midnight.

Q. Was anyone else there at that time?

A. There was another patient in the other bed at the time when I was speaking to him.

Q. And that was the night she was brought in?

A. Well, she came in earlier on the evening assignment.

Q. And what time did you come on duty?

A. Eleven o'clock.

Q. Would you tell us what was the conversation that you had with Mr. Urban?

A. I believe I asked him what had happened to her or something pertaining to, you know, her condition.

Q. And what did he tell you?

(Testimony of Esther Osborne.)

A. He replied that about, approximately two weeks ago she had been beat up by some woman.

Q. Do you remember any more of the conversation?

A. Well, I remember him saying that she had been perfectly fine that morning, the morning of the day that she came to the hospital. [112]

Q. Did you notice any particular parts of the, of her injuries?

A. I believe she had a large bruise behind her right ear and she had several bruises, numerous bruises all over her body.

Q. And were you still on duty when, or when Mrs. Cathey expired? A. That is correct.

Q. Do you remember about the time that was?

A. I believe it was approximately one-thirty, yes, I can remember.

Mr. Stevens: Thank you. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mrs. Osborne, was the Doctor there at the time that she died?

A. You mean was he there at the exact time?

Q. Yes, the time of her death?

A. Doctor Anderson came and pronounced her.

Q. Who? A. Doctor Anderson.

Q. Was he there at the time that she died?

A. I believe her respirations had apparently ceased just before, but Doctor did come and pronounce her.

(Testimony of Esther Osborne.)

Q. Had you after you came on shift ever called Doctor Anderson, tell him to come to the [113] hospital?

A. Mrs. Bray, I believe, that called him on my assignment and she had called him earlier, I believe.

Q. You knew about that call then, did you not?

A. Yes.

Q. Was there more than one?

A. I can't remember, but I do know she called him.

Q. Mr. Urban told you that she had been, that Miss Cathey had been feeling quite well that morning?

A. Yes, he did.

Mr. Taylor: That's all, Mrs. Osborne.

Mr. Stevens: Thank you very much.

(Witness excused.)

Mr. Stevens: May we have the noon recess, your Honor?

The Court: Very well, it is just about twelve o'clock, so members of the jury, once more I admonish you not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion thereon until the case is finally submitted to you. The jury will be excused until two o'clock and is there anything for us?

The Clerk: Not for us, for Judge Hodge there is, sir.

The Court: I think he is going to hold Court at the Carpenters' Hall. We can then recess until two o'clock.

The Clerk: Court is recessed until two [114] o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel, the government attorneys. The parties wish the polling of the jury?

Mr. Stevens: We will stipulate, your Honor.

Mr. Taylor: We will waive the polling and stipulate they are all present.

The Court: Very well. Proceed.

Mr. Stevens: Call Mr. Douthit.

JAMES L. DOUTHIT

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. James L. Douthit.

(Testimony of James L. Douthit.)

Q. Where do you live, Mr. Douthit?

A. 1107 First Street, Fairbanks.

Q. What do you do?

A. I am a photographer-reporter for the Fairbanks Daily News-Miner. [115]

Q. How long have you been a photographer, Mr. Douthit?

A. Oh, since 1949. I am not much of a mathematician, eight years, I guess.

Q. It would be about six years, wouldn't it, '49?

A. A professional for six years, done photographs for eight.

Q. Do you do anything besides take the photographs?

A. Yes, I process them, develop them and print them.

Q. Do you have a developing studio or——

A. We have a standard newspaper darkroom in the basement of the News-Miner, enlargers and all the usual photographic materials.

Q. Do you know what type of enlarging material you have?

A. You mean the machine?

Q. Yes.

A. Well, we have two of them, an Omega D2 enlarger which is very recent and a De Jur professional type enlarger, four by five size that one is.

Q. This is Government's Indentification 1, Mr. Douthit; would you hold it that way, please, and tell us, do you know who made that enlargement?

A. Yes, I made the enlargement.

(Testimony of James L. Douthit.)

Q. And what did you make the enlargement from, from another print or from the negative?

A. From the negative.

Q. And is that, was that made on one of the machines you [116] have just, or were one of the machines you have just described?

A. Yes, this was made with the De Jur professional four by five enlarger.

Q. And is that product that you have in your hand distorted at all from the original negative that would have been, or correction, from the original contact size print that would be printed from the original negative?

A. I don't believe so. If there was any distortion at all it would be so small that you couldn't measure it. I mean that I couldn't measure it.

Q. Did, you did the enlarging yourself, did you?

A. Yes.

Q. Now, that is Government's Identification No. 2, Mr. Douthit, did you have any connection with that identification?

A. Yes, I enlarged this from a four by five negative.

Q. And—— A. On the same enlarger.

Q. Who presented these two negatives to you, these two that you have so far?

A. These negatives were presented to me by William Trafton, Lieutenant with the Territorial Police.

Q. And is that enlargement a fair reproduction of the print from the negative?

(Testimony of James L. Douthit.)

A. Yes, it is.

Q. Are you aware of any distortions on that enlargement?

A. Well, it depends on what you mean by distortions. If [117] a, this photograph here is undistorted generally. At the very corners of the pictures there would be a small amount of falling off of the picture quality in relation to the center portion because of the quality of the enlarger and the size of the reproduction.

Q. But the, it——

A. It is not exactly the same as the contact print that would be made from the same negative. No enlargement is.

Q. And that is because the process of blowing up distorts the detail outline? A. That's right.

Q. Well, as far as the content of the picture itself, is there any distortion caused by a wrongful or not necessarily wrongful, but a different type of angle?

A. No, there is no distortion of the enlargement here, other than just the normal distortion of enlarging. There is no appreciable distortion even considering the enlarging.

Q. This is Government's Identification 3; have you, will you tell us, is that another one of your enlargements? A. Yes, it is.

Q. And did you make that yourself at the same time as these others?

A. Yes, it was made at the same time as the others.

(Testimony of James L. Douthit.)

Q. Was the negative for that also delivered to you by Mr. Trafton? A. It was. [118]

Q. And is that a fair reproduction?

A. It is.

Q. This is Government's Identification 4, Mr. Douthit; did you also make that enlargement?

A. Yes, I did.

Q. And is it a fair reproduction of the original?

A. It is.

Q. The negative obtained by you from the same person, Mr. Trafton? A. Yes.

Q. You will notice that on that there is an additional piece of paper? A. Yes.

Q. That was not placed there by you, was it?

A. No, it wasn't.

Q. This is Identification 5, Mr. Douthit; is that likewise a reproduction by you? A. It is.

Q. And it is an enlargement, is it?

A. Enlargement, four by five negative.

Q. And does that fairly reproduce the contact print in enlarged form? A. It does.

Q. Did you obtain the negative for that enlargement, also from Mr. Trafton? A. Yes. [119]

Q. This is Government's Identification 6; is that also another enlargement of the same series?

A. It is.

Q. Made by you at the same time?

A. Yes.

Q. And was the negative obtained by you from Mr. Trafton? A. Yes, it was.

Q. And is that a fair reproduction in large size

(Testimony of James L. Douthit.)

of the contact print? A. It is.

Mr. Stevens: At this time, your Honor, we offer Government's Identifications 1 through 6 for the purpose of establishing identity and also the character of the wounds on the body of the deceased.

Mr. Taylor: If the Court please, we are going to object to the introduction of these in evidence upon the grounds that the proper foundation has not been laid for the introduction of them; for the further reason that the witness has testified distortion; no testimony as to whether the coloring of the wounds are the same on this as on the contact pictures. I do not believe, your Honor, that these enlargements at this time are admissible in evidence.

The Court: Government's Identification 1 to 6 inclusive, will be received.

Mr. Taylor: Could I approach the bench, please?

The Court: Yes, indeed. [120]

(Thereupon, the attorneys approached the bench and the following proceedings were had out of hearing of the jury.)

Mr. Taylor: If the Court please, we are going to object to the introduction of these upon the grounds that there is no showing of any contact pictures here for comparison as to whether these are true representations or not. That is what I mean by the proper foundation has not been laid for those things. Another thing, these things are introduced in this, blow-up evidence, and with additional blackening showing on those wounds for the purpose of prejudicing this jury. If they are for the

(Testimony of James L. Douthit.)

purpose of identification only, as the United States Attorney says, the contact pictures, your Honor, would be the best evidence, not something that is blowed up here for the purpose of prejudicing the jury. Until the contact pictures are shown where they are taken direct from the negatives, these are not admissible because they are not true representations.

The Court: You stated that for the record?

Mr. Taylor: Yes, sir. It has been held in this Court, your Honor, before, the same thing, that the enlargement cannot be shown until the original contact pictures are shown.

Mr. Stevens: We have the contact pictures as an identification. We would also offer them in evidence if Mr. Taylor wants to have them for comparison purpose.

Mr. Taylor: I think they can be put in evidence. I don't see the use of anything else. [121]

The Court: Are you offering them at this time?

Mr. Stevens: I will offer them before the jury if Mr. Taylor wishes. These are our exhibits. We have no objection of putting them into comparison.

Mr. Taylor: I don't want them for comparison. The contact pictures, I have no objection to them whatsoever.

The Court: Does the government wish to offer the other exhibits at this time or not?

Mr. Stevens: Yes. That would be Identification 7.

The Court: There being no objection, they will be received.

(Testimony of James L. Douthit.)

Mr. Stevens: Thank you.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:)

Mr. Stevens: Would the Court instruct the Clerk to enter Identification 7 also in evidence?

Mr. Taylor: I would like to look at them first.

The Court: These are to be received.

Mr. Taylor: I would like to see those, your Honor. I might have some objection to the particular pictures.

The Court: Give Mr. Taylor an opportunity. That is Government's Identification 7.

The Clerk: Identification 1 is Government's Exhibit A; 2, Exhibit B; 3, Exhibit C; 4, Exhibit D; 5, Exhibit E; and 6, Exhibit F.

(Government's Identifications 1 through 6, inclusive, were admitted in evidence as Government's Exhibits A through F, inclusive.) [122]

Mr. Taylor: We have no objection, your Honor, to the introduction of Plaintiff's Identification 7 (1 to 6).

The Court: They will be received and the Clerk will mark them.

The Clerk: That is Government's Exhibit G (1 to 6 inclusive).

(Government's Identification 7 (1 to 6, inclusive) was admitted in evidence as Government's Exhibit G (1 to 6, inclusive).)

(Testimony of James L. Douthit.)

The Clerk: Government's Identification 8; Government's Identification 9; Government's Identification 10; Government's Identification 11; Government's Identification 12.

(Five (5) photographs were marked Government's Identifications Nos. 8 through 12, respectively.)

Q. (By Mr. Stevens): These are Identifications 8 through 12, Mr. Douthit. Without telling us what is reproduced there in photographic form, could you tell us if you know who took those pictures?

A. Yes, I took the pictures.

Q. Do you recall when it was you took them?

A. I believe it was the 26th of February, 1955. I am not sure. I have a date on here but I am not sure whether it was the date I printed them or the day I took them.

Q. And who developed them?

A. I developed them. [123]

Q. And when did you, did you print them?

A. I printed them.

Q. Where did you take them?

A. I took them in the Alibi Club on South Fairbanks, South Cushman Street in South Fairbanks.

Q. And now if you take the first one there, Mr. Douthit, could you tell us what that is taken into, what is this you have first?

A. That is the number of cards corresponding to the numbers I have on the back. These are my notes on what the pictures show.

(Testimony of James L. Douthit.)

Mr. Stevens: Pardon me, I didn't know you had this. Just a minute.

Mr. Taylor: Yes, your Honor, self-serving. We object to it.

Mr. Stevens: He is using it for the purpose of recollection. I am not offering it.

Mr. Taylor: I am objecting to that, too.

Mr. Stevens: You will have to testify without that, Mr. Douthit. I'm sorry.

Q. (By Mr. Stevens): Would you tell us what the first one is, Government's Identification 8, I believe?

A. This is a picture taken down into a drawer.

Mr. Taylor: Just a moment. Just a moment. I am going to object to any testimony on these pictures until the [124] proper foundation is laid, your Honor. Another thing, the foundation hasn't been laid as to whether or not that place was in the same condition it was on the 22nd day of January, 1955. That was, he claimed they was taken on the 28th day of February, your Honor, very near a month and a half afterwards, and until they can show this place was in the same condition we are going to object to the introduction.

The Court: Objection sustained. If counsel can clarify the witness as to when the pictures were taken and lay a proper foundation.

Mr. Stevens: I believe he stated not the 28th, your Honor, the 26th, but I do not believe this witness would be a proper witness to establish the condition of the premises. The objection might be prop-

(Testimony of James L. Douthit.)

er at a later time when they are offered in evidence, but for the purpose of laying the foundation as to admissibility.

The Court: I think the objection was, he was testifying as to what was in the pictures. You may proceed upon question, answer and objection.

Q. (By Mr. Stevens): Mr. Douthit, it is not our intention to find out what the pictures shows, but where the picture was taken. In other words, can you tell us that first picture, what type of object it was reproduced and how you reproduced it, how you took the picture, from what angle?

Mr. Taylor: Just a moment, Mr. Douthit. I am going [125] to object to any questioning about these pictures until the foundation is laid as to whether they are contact pictures or whether they are enlargements.

The Court: Overruled.

Q. (By Mr. Stevens): Would you answer that question for us, Mr. Douthit, the object and the angle where you were when you took it?

A. This first picture that I am holding is taken of a drawer of a chest of drawers, the inside corner taken from above.

Q. And you took that picture?

A. I took the picture.

Q. Now, would you give us the answer to Mr. Taylor's question, is that a direct contact print or is that an enlargement?

A. No, that is an enlargement of a two and a quarter inch square negative.

(Testimony of James L. Douthit.)

Mr. Taylor: Just a moment, your Honor. We are going to object to the use of these enlargements.

The Court: Overruled.

Q. (By Mr. Stevens): What type of camera did you use?

A. The pictures were taken with a Rolliflex, twin-lens reflex.

Q. That takes?

A. Taking 120 size film. [126]

Q. Twelve pictures to the roll? A. Yes.

Q. And was the two and a quarter contact print square?

A. Yes, two and a quarter inches square.

Q. And what is the size of this?

A. Eight by ten inches.

Q. And did you make the enlargements from the original negative?

A. I made the enlargements.

Q. That is fine. Would you go to the next one, just shuffle them there. Tell us what the next one is, please?

A. The next one is a picture taken of the wall with a man's hand.

The Court: Is that an Identification; what Identification is that?

Mr. Douthit: 9 that would be, No. 9 is a picture taken of a wall with a man's hand holding a pencil, pointing.

Q. (By Mr. Stevens): Do you know whose hand that was?

(Testimony of James L. Douthit.)

A. I can't recall right at the moment, but I believe it was William Trafton's of the Territorial Police.

Q. Did you take that picture also?

A. Yes, I did.

Q. And were, with the same camera?

A. With the same camera.

Q. Is that an enlargement of the same size as Identification 8? [127] A. Yes, it is.

Q. Are Identifications 8 and 9 fair reproductions of the objects that you took the pictures of?

A. They are.

Q. Has there been any distortion or any change in the print from the original negative?

A. No, I don't believe there have been.

Q. You took the pictures, developed the film and printed the prints yourself, did you?

A. I did.

Q. Would you go on to No. 10, please? What is No. 10?

A. No. 10 is the same as No. 9. It is the same copy. We have two of them here. One is printed a little darker than the other one.

Q. I believe if you compare them you will find they are not exactly the same?

A. No, you're right. No. 10 is of a similar subject the hand pointing to a different spot on the wall. That is the two differences.

Q. And did you take that picture?

A. I did.

Q. At the same time with the same camera?

(Testimony of James L. Douthit.)

A. Yes, I did.

Q. And you developed and printed the picture yourself? A. Yes.

Q. Would you tell us what No. 11 is, please? [128]

A. No. 11 is a picture of a mattress folded on a bed.

Q. Did you take that the same time in the same manner? A. I did.

Q. And did you develop and print it at the same time in the same manner? A. I did.

Q. Are Identifications 10 and 11 fair reproductions of the negative without distortion?

A. They are.

Q. Is there also a No. 12 there, Mr. Douthit?

A. I believe so. Yes.

Q. And what is that, please?

A. No. 12 is a picture of a door with a window and in front of the window a man's hand.

Q. And was that taken at the same time with the same camera, reproduced and printed the same way as the others? A. It was.

Q. In other words, you took all the pictures, developed the negatives and printed those prints yourself? A. Yes.

Q. And you did the enlarging? A. Yes.

Mr. Stevens: Thank you very much, Mr. Douthit. Your witness, Mr. Taylor.

(Testimony of James L. Douthit.)

Cross-Examination

By Mr. Taylor: [129]

Q. Mr. Douthit, did you have permission from Mr. Urban to take the pictures?

A. It depends on how you mean. He did not ask me not to.

Q. Answer it yes or no? A. No.

Q. O. K. You say Mr. Douthit that these pictures were taken on the 26th day of February?

A. I believe they were, to the best of my knowledge.

Q. You believe, were you there?

A. I was there. I don't have the calendar.

Q. And who was with you at the time?

A. William Trafton, Ted Stevens, Mac Rodgers and several other people.

Q. You know whether or not they had a search warrant to go to Mr. Urban's place?

A. No, I don't know.

Q. You don't know. You just went in there, started taking pictures around the place?

A. It was a public bar?

Q. Sir? A. It was a public bar.

Q. Was there living quarters public?

A. No one said they were living quarters.

Q. What?

A. No one said they were living quarters to me.

Q. You said you were looking down in a drawer? [130] A. That's right

(Testimony of James L. Douthit.)

Q. There was a dresser there?

A. There was a dresser there.

Q. In the bar?

A. In the bar, in the bar building.

Q. That was in the room where the bed was?

A. That is true.

Q. That dresser drawer could be taken out, could it not, Mr. Douthit?

A. I suppose so.

Q. And could be brought here?

A. I believe it could be.

Q. The mattress that you took could be brought here?

A. It could have been, I mean it could be.

Q. And could we have your negatives to compare for distortion?

A. Yes. Mr. Stevens has the negatives.

Q. Now, Mr. Douthit, have you looked at the contract pictures made, contact from the negative?

A. What was that again, sir? I didn't hear it.

Q. Have you examined the four by five pictures that they were blown up from?

A. The negative, yes.

Q. And isn't it a fact there is considerable distortion, Mr. Douthit?

A. There is very little distortion between the negative [131] and the print. There is distortion in the negative if that is what you mean.

Q. Now, Mr. Douthit, who made the change, who made the bruises on some of these darker in these pictures than they are in this? You?

A. No, sir. I did not.

(Testimony of James L. Douthit.)

Q. What? A. I did not.

Q. Who did? A. The printing.

Q. The printer did?

A. No, you are wrong. There is two different kinds of paper there. One kind of paper is reacted on by light in a certain way and the other the same bruises in the negative will print differently on different kinds of paper. One piece of paper is enlarging paper and the other is enlarging paper.

Q. Did you pick out that particular kind of paper so it would show darker on these enlargements? A. I did not.

Q. Who did?

A. I don't know who picked it out. In fact, Lieutenant Trafton bought the paper, the only paper in town at that time that size.

Q. Did he buy that so it would print the bruises darker? A. He did not. [132]

Q. How do you know?

A. It was the only kind he could find. We went to the Co-op Drug Store and bought the only paper he could find of the right size.

Q. Kind of convenient for Mr. Trafton to find just this one kind of paper?

Mr. Stevens: I object to that. That is argumentative.

The Court: Sustained.

Q. (By Mr. Taylor): Mr. Douthit, on these exhibits here, now isn't it a fact, Mr. Douthit, this head that shows in this picture is much larger in

(Testimony of James L. Douthit.)

proportion to the surroundings than it is on the negative?

A. I don't know, but it could be. If I may see the negative I can tell you. I didn't say that these were the complete reproductions of four by five. They wouldn't fit in the picture.

Q. So you make an enlargement, a larger picture then?

A. There is all kinds of stuff out here perhaps.

Q. Then you cut it down?

A. No. No. This is the size of the paper that you have to work on. You blow up the picture to the highest magnification that you can get the picture in. I didn't consider when I print this that this particular stuff over here, I didn't know what these pictures were going to be used for. Nobody [133] asked me to blow up four by five exactly into eleven by fourteen exactly.

Q. Well, these other pictures, who asked you to go out to the house, anybody in authority or was you looking for a scoop?

A. I believe I was probably, let me think. I believe that I heard that there was to be an arrest in the case and requested that I could go along and see it for the paper.

Q. And when you went up there was it arranged for you to throw the handcuffs on Mr. Urban so you could get a picture?

Mr. Stevens: I object to that. That is outside the scope of the direct examination, a matter of defense.

(Testimony of James L. Douthit.)

The Court: I am going to sustain the objection.

Mr. Douthit: It was not.

Q. (By Mr. Taylor): So these pictures then, Mr. Douthit, are not the full reproductions of the original contact pictures, are they?

A. No, I have never seen the original contact pictures but I would say that they are not the complete enlargement of four by five to whatever the size of that, eleven by sixteen or eleven by fourteen proportion. There has been a portion cut off, a little bit on the edge. I haven't measured them. I don't know whether the paper size is exact or whether the, how the four by five fits up with it but the portion of the four by five that is shown in there has been, is exact, an [134] exact reproduction of the portion of the four by five. The same with the other six, the negatives are two and a quarter inches square in circumference, or outside.

Q. Then, I take it then, Mr. Douthit, from your testimony these pictures are blown up to accentuate parts of the original, are they not?

A. If you will, I think you might say that, but only if you——

Q. I did say it, isn't that right?

A. That's right. The background, walls——

Mr. Taylor: That is all I wanted to know. That's all.

(Testimony of James L. Douthit.)

Redirect Examination

By Mr. Stevens:

Q. By your testimony, Mr. Douthit, I take it that the fringe area of the four by five has been left out because mathematically it doesn't blow up into this size, isn't that correct?

A. That's true, or it has nothing to do with the subject. In a photographic picture, a picture may be taken with many extraneous things such as the wall back there and you want to take a picture of the people. You don't print it with all the wall in there, because four-fifths of the picture I can see right there is the wall and the people are the thing.

Q. What is reproduced here is the subject of the picture in a true enlarged form? [135]

A. That is right. That is true.

Q. There has been no attempt to accentuate any part that was reproduced other than the subject itself?

A. There is no attempt to accentuate anything there in any manner. The picture was enlarged in the sizes that they were enlarged to from the proportion at four by five only in that that was the picture. That was the thing that I was looking at. No enlarger ever, no photographer enlarges the sky when there is no reason for the sky in the picture. I wasn't enlarging the corners of the walls. There is no distortion of the subject matter that is shown in the pictures.

Mr. Stevens: Thank you, Mr. Douthit.

(Testimony of James L. Douthit.)

Recross-Examination

By Mr. Taylor:

Q. Well, Mr. Douthit, isn't it a fact whether you intended to or not you do accentuate a particular part of a picture that was taken, don't you?

A. Well, I would like to know what you mean by accentuate?

Q. Well, if you take a picture that is just, got a head and a part of the body and you take and blow this part that is just the head up to enormous proportion to show scars or wounds or bruises on it, isn't that accentuating a certain part of that picture?

A. That isn't what I did. You said blew up the head, or [136] in regard to the body. Nothing that was whole in the picture was cut off. If the body or the head in this particular case that you were holding it was large, it was because that was the main, the logical, the only part of the body visible in the picture.

Q. Well, Mr. Douthit, isn't that accentuating, if you blow it up that big and then you cut it down to take a particular part of it, isn't that accentuating?

A. I didn't cut the head down.

Q. I am not talking about the head. I mean everything.

A. All I did was cut off the extraneous portions; the portions not considered to me a part of the picture.

(Testimony of James L. Douthit.)

Q. In other words, you were bringing them in, enlarging certain features of this to show this injury then? A. No.

Q. Who told you to do it?

Mr. Stevens: Just a minute, your Honor. I object to this, two questions without giving the witness a chance to answer and ask that Mr. Taylor permit the witness to answer the question.

The Court: Yes; I think the cross-examination is proper and I do think you had a double question there, Mr. Taylor.

Mr. Taylor: I will withdraw the second one temporarily. [137]

Mr. Douthit: Would you repeat the first one?

(Thereupon, the reporter read the question.)

Mr. Douthit: If that was your question, no.

Q. (By Mr. Taylor): You weren't?

A. I had no idea that it was going to be showed to the jury. Those as far as I was concerned were pictures Bill Trafton wanted. I did not inquire what they were for.

Q. What did you think Bill Trafton was going to do with them, hang them in his den?

A. Well, they could have. They have a deal at the Territorial Police where they have hung many of the pictures I have enlarged for them.

Q. Are there any of these pictures then, these enlargements 1 to 6, Identifications would be 1 to 6 that show the whole negative on here?

A. I don't know. If I could see the whole nega-

(Testimony of James L. Douthit.)

tive I could tell. I don't know if any of those are even blown up out of proportion as you call it.

Q. You say there is some distortion on all of it?

A. Very little bit of distortion, the normal amount.

Q. But there is some distortion?

A. You would have to explain what you mean by distortion.

Q. You are a photographer? A. Yes.

Q. Did you ever hear of distortion? [138]

A. Yes; it means that I tilted the picture or something so that one portion will appear in a different relationship than it did in the original.

Q. That is the practice indulged in by newspaper photographers, is it not?

A. I do not know. It is not indulged in by me.

Q. So then you would have to make a inspection of the negatives then before you could tell whether these pictures contained all that shows on those negatives, is that right? A. That is true.

Mr. Taylor: That's all.

Redirect Examination

By Mr. Stevens:

Q. You had the negatives before you when you developed these pictures, did you not?

A. Yes, I had them.

Q. You yourself went to the procedure to blow them up from the four by five to what size is this?

(Testimony of James L. Douthit.)

A. I believe that is eleven by fourteen, or fourteen by sixteen. I'm not sure which.

Q. And at that time during the process of enlarging the pictures, did you intentionally accentuate any portion of the enlargement?

A. I didn't.

Q. You then reproduced the subject of the picture which is obviously the body of a deceased woman? [139]

A. That is the, I mean that is what I did.

Q. The extraneous portions being the surroundings in the funeral home and the walls?

A. Cut out.

Q. That did not fit on the paper, is that correct?

A. That is true. The object was to show on that piece of paper as much of the picture as possible, of the original negative.

Mr. Stevens: Thank you. Your witness, Mr. Taylor.

Mr. Taylor: No more questions.

Mr. Stevens: Thank you, Mr. Douthit.

(Witness excused.)

WILLIAM B. DE WALT

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. William B. De Walt.

(Testimony of William B. De Walt.)

Q. And what is your occupation, Mr. De Walt?

A. City Policeman.

Q. For the City of Fairbanks, Alaska?

A. That's right, sir.

Q. How long have you been a city policeman?

A. Approximately seven months. [140]

Q. You working as a policeman in January of 1955?

A. I was.

Q. Calling your attention to the 30th day of January, 1955, were you on duty on that day?

A. I was.

Q. And are you acquainted with the Alibi Club in South Fairbanks?

A. I am.

Q. Did you have occasion to go there while you were on duty on the 30th day of January, 1955?

A. I did, sir.

Q. What was the occasion?

A. There was an ambulance called to that address. the Alibi Club and it is routine for the City Patrol car to accompany the ambulance to such a call and I did on that night.

Q. Who was there at that time when you went to the Club?

A. When I got, walked into the Club the two ambulance attendants were putting Myrtle Cathey on the stretcher and Mr. Urban was also there.

Q. What time was it when you went down there?

A. Approximately nine-thirty that night.

Q. Did you have any conversation with Mr. Urban at that time?

A. I did.

(Testimony of William B. De Walt.)

Q. And what was that conversation about?

A. Well, I noticed the condition—— [141]

Mr. Taylor: Just a moment, your Honor. I think the witness should be confined to answer to the conversation, lay the proper foundation.

The Court: That's right, Mr. De Walt, you were asked what the conversation was. You may state——

Mr. De Walt: The conversation between Mr. Urban and I was concerning, I asked him how did Miss Cathey get beat up and what was the name at the time. At the time I didn't know what her name was. I asked first her name. I got a name. I asked how did she, was she, get in the condition that she was in and he told me that she had been in a fight about three days previous to that and with another woman so at the time they just about completed putting her on the stretcher and I told him that I would, he wanted to accompany the ambulance to the hospital and I told him I would see him later at the hospital so I escorted the ambulance to the hospital and when we got into the emergency room.

Q. (By Mr. Stevens): Just a minute. You went right to the hospital, did you? A. I did.

Q. Did you see Mr. Urban again there?

A. I did.

Q. Was there anyone with him that time?

A. No one other than the two ambulance attendants and the nurse who had come into the room, Myrtle Cathey and himself. [142]

Q. And did you continue the conversation with him at that time? A. I did.

(Testimony of William B. De Walt.)

Q. Would you tell us what the further conversation was concerning the same matter?

A. I continued the conversation where we had left off. I asked him who was the person she had been in a fight with and he stated he didn't know and I continued to try to get a description from the person he said didn't know that. Did he have any idea what she looked like and he said he would probably know her if he saw her again and I kept asking him about the date and he still maintained it was approximately three days before that. That was all that he knew about it.

Q. Did you ever have an opportunity to talk with Miss Cathey?

A. I did not. At the time when I saw her she was unconscious.

Q. Did you have any further connection with the deceased woman, Mr. De Walt, official status?

A. I did the following Wednesday night.

Q. Was that by way of investigation?

A. It was.

Q. Then the two conversations that you had with Mr. Urban were both on the 30th day of January?

A. It was.

Mr. Stevens: Thank you very much. Your witness, Mr. Taylor. [142-A]

(Testimony of William B. De Walt.)

Cross-Examination

By Mr. Taylor:

Q. Mr. De Walt, did you know that Mr. Urban had called a doctor for Miss Cathey nine days prior to the 30th of January?

A. No, sir; I didn't. I knew that he called for the doctor that day.

Q. You didn't know then that he had also called for the doctor on the 22nd day of January?

A. No, sir; I didn't know that at that time.

Q. And who else was there at the time you had the conversation with Mr. Urban?

A. Well, as I recall the two ambulance attendants, Myrtle Cathey, of course, and myself. Now, if someone else was there they were in the background, but I didn't question anyone. No one was right in the foreground but those people that I know of.

Q. Was that a casual conversation with Mr. Urban?

A. It was not a casual conversation. I was investigating the matter.

Q. Because a woman was being taken to the hospital you were investigating?

A. I was investigating the cause of her condition.

Q. You didn't know, though, that that condition existed for ten days prior to that, did you? [143]

A. I didn't know it, no, sir.

Q. Oh, you didn't know that and isn't it a fact

(Testimony of William B. De Walt.)

that Mr. Urban said that that was ten days before?

A. No, sir; he made it very distinctively because I repeated the question several times, both at the Club Alibi and at the hospital.

Q. Why did you repeat that question several times?

A. Well, I wanted to get a clear-cut picture of what happened.

Q. Didn't you get a clear-cut picture the first time?

A. I did not get a clear-cut picture of just what happened.

Q. He said three days before, didn't you get a clear-cut picture?

A. Not only the three days, about the whole matter. I wanted him to review the whole matter.

Q. He told you then she had got in a fight with some woman, is that right? A. That's right.

Q. Now, Mr. De Walt, could you tell me, you know of any reason that Mr. Urban who had had medical attention for this——

Mr. Stevens: I object to these self-serving statements on cross-examination, your Honor.

The Court: I don't know what his question [144] is.

Mr. Taylor: If the District Attorney will, please, refrain from interrupting I will get the question out.

The Court: Proceed.

Mr. Taylor: May I proceed?

(Testimony of William B. De Walt.)

The Court: Proceed.

Q. (By Mr. Taylor): Mr. De Walt, can you think of any reason why Mr. Cathey, or Mr. Urban who had been attending Miss Cathey for a period of nine days prior to the time you went there would tell you that this thing had happened three days before, that she had been in a fight three days before?

A. I couldn't give you any substantial reason, sir. Any reason I would give you would be a matter of guesswork.

Q. It would be merely conjecture or conclusion, would it not? A. That's right.

Mr. Taylor: That's all, Mr. De Walt.

Mr. Stevens: Thank you, Mr. De Walt. Do you have any objections to excusing Mr. De Walt?

Mr. Taylor: No, that's all right.

Mr. Stevens: Do you have any objection to Mr. De Walt staying in the courtroom, Mr. Taylor?

Mr. Taylor: Well, I think he should conform to the rule. There might be some reason, we might want to call him back. [145]

Mr. Stevens: Very well.

(Witness excused.)

The Court: Do you wish to proceed with another witness before recess?

Mr. Stevens: I didn't notice your Honor. Take a recess?

The Court: Very well. Members of the jury, it is once more my duty to admonish you that it is

your duty not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject matter of the trial; and do not form or express any opinion until the case is finally submitted to you. We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 2:50 p.m., the Court took a recess until 3:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record again show the presence of the defendant and his counsel; government attorneys.

Mr. Taylor: We will stipulate that the jury is all present, your Honor.

The Court: Thank you, Mr. Taylor.

Mr. Stevens: The government will stipulate, your Honor. [146]

The Court: Thank you, Mr. Stevens. You may proceed.

DONALD BYROM

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Donald Byrom.

(Testimony of Donald Byrom.)

Q. And where do you live, Mr. Byrom?

A. 1225 Ninth, City of Fairbanks, Alaska.

Q. And what is your occupation now, sir?

A. I am a bartender right now.

Q. What was your occupation in January of 1955, this year?

A. I was a police officer for the City of Fairbanks, Fairbanks, Alaska.

Q. And were you working as a police officer on the morning of the 31st of January of this year?

A. I was.

Q. On that morning did you come in contact with the name of Myrtle Cathey? A. I did.

Q. How was that, sir?

A. I came on duty at midnight the 30th and 31st, from midnight to eight shift. Upon my arriving at the station I was informed by Officer De Walt and Officer Goodfellow, the [147] Territorial Police that they had taken this woman to the hospital and they gave me the name of Myrtle Patricia Cathey. At that time I resumed my regular patrol.

Q. Did you ever have contact with that subject on your duties that day? A. I did.

Q. What time was that?

A. Approximately one-forty in the morning of the 31st I received a call over the radio that the woman in question, that had been told me earlier had died at St. Joseph's Hospital, in order for me to come to the station, pick up the death report and go to St. Joseph's Hospital, which I did. Upon arriving there I went to the third floor, second or

(Testimony of Donald Byrom.)

third, and at that time I came in contact with Doctor Anderson. I started making out the death report of the deceased. Doctor Anderson gave me some information of the——

Q. That would be a matter of hearsay, Mr. Byrom. Did you see Mr. Urban that evening?

A. I did, sir.

Q. When did you see him?

A. I saw him at my arrival at the hospital when I was talking to the doctor.

Q. At any time did you have a discussion with Mr. Urban that evening? A. I did.

Q. When was that? [148]

A. Just right after the Doctor had talked to me Mr. Urban was standing right there.

Q. And was the Doctor present while you had the conversation?

A. He was present during the first part of the conversation.

Q. Where did the conversation take place?

A. Right in front of the desk, oh, I don't remember whether it was the second or third floor.

Q. And what was the conversation that you had with Mr. Urban?

A. Well, my first part of the conversation with Mr. Urban was when I was making out the death report, trying to find out the next of kin to be notified.

Q. And what was the rest of the conversation?

A. The rest of the conversation got into, I was

(Testimony of Donald Byrom.)

talking to him and it related to her from the Alibi Club and I asked him at that time where it took place at, the beating took place at and he told me out at the joint.

Q. And did you have any further conversation at that time? A. I did.

Q. What was that?

A. And I says, well, do you know who done the beating and he says, "I don't know the person's name." It was a women, I don't know the description of the woman; I don't [149] know anything about the woman except I would know her again if I would see her.

Q. And what did you do following that conversation?

A. Following that conversation the Doctor had asked me just prior to that if I wanted to view the body. At that time I was talking to Mr. Urban and the Doctor had left and the two nurses that testified here this morning, I don't remember exact names now, they told me to come with them, and I went with, up with them to the room where the deceased was. At that time I viewed the body and seen what the shape it was in and the bruises and the marks. At that time I walked back out of the room to the telephone and notified the station right away to have a Territorial Officer to come down and take photographs and to notify Sergeant Wirth, who is the investigating officer on any case of such.

Q. And then did Mr. Wirth later take over the investigation on behalf of the City?

(Testimony of Donald Byrom.)

A. Yes, sir, when they got in contact with Mr. Wirth I already had been talking with Mr. Goodfellow and then Sergeant Wirth came in and I asked him if he wanted me to take him.

Mr. Taylor: Just a moment. We are going to object to the conversation with Sergeant Wirth.

The Court: Sustained.

Mr. Stevens: I believe that is all. That is all. Thank you. Your Witness, Mr. Taylor. [150]

Cross-Examination

By Mr. Taylor:

Q. Did you say you made out the death report, Mr. Byrom?

A. I did, sir, for our files and for the notification of next of kin.

Q. Did it have the cause of death on it?

A. The cause of death, no, sir. I left that blank because at that time there was nothing definite on it, sir.

Q. So it actually wasn't a death report then, was it?

A. Yes, sir, it was. If I am not mistaken, Mr. Taylor, I'm sorry, I think I put down due to a beating.

Q. That was a conclusion on your part, wasn't it? A. Yes, sir.

Q. You didn't know at that time that she had died of a hemorrhage of the brain, did you?

A. No, sir, I did not.

Q. You found that out later?

(Testimony of Donald Byrom.)

A. No, sir; I have not yet.

Mr. Taylor: That is all, Mr. Byrom.

(Witness excused.)

SHERRY RENAE YENDES

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you tell us your name, please? [151]

A. Sherry Renae Yendes.

Q. And where do you live, Miss Yendes?

A. Pardon?

Q. Where do you live?

A. 3 Antoinette, in Lometa.

Q. Do you know Mr. Urban?

A. Yes; I knew Mr. Urban outside.

Q. How long have you known him?

A. I have been a very casual acquaintance with him for, I would say about six or seven years.

Q. Do you know, are you acquainted with his place of business, the Alibi Club? A. Pardon?

Q. Are you acquainted with his place of business, the Alibi Club?

A. I still can't hear you.

Q. Sorry. Do you know his place of business, the Alibi Club? A. Yes.

Q. Have you ever been there?

A. Yes, several times.

(Testimony of Sherry Renae Yendes.)

Q. Could you tell us, do you know were you there on or about the 22nd day of January of this year?

A. Yes, I was.

Q. What time did you go there? [152]

A. Well, it was after the bars had closed downtown about, I would say, I stayed downtown until the bars closed. I was in the Riverside until it closed and then I went out and stopped at the Talk of the Town to see Pat Chase, and I had a drink with Pat and I went on out to the Alibi.

Q. Was Mr. Urban there?

A. Yes; he was working behind the bar.

Q. Was there anyone else there at that time?

A. I believe there was one or two other people in there when I went in.

Q. Did you know Pat Cathey?

A. Yes; I met her last fall when I came back from the country.

Q. Do you know whether or not she was there on the evening of the 22nd?

A. No, I don't. I met her in October.

Q. That is the 22nd of January, was she there when you went there this night?

A. When I went in? No, she wasn't.

Q. How long did you stay at the Alibi Club?

A. Well, when I went in I asked Curley where Pat was. He said she was out drinking, she was down at the Players. So I had a drink with him and then he said that we would go down there after while, he was going to close later so I went up to

(Testimony of Sherry Renae Yendes.)

the Top Hat and had a drink with Chuck and then I came [153] back down and picked Curley up, took him down. We stopped at the Nugget and had a drink with June and then we went on down to the Players Club.

Q. Do you remember what time that was?

A. No, but it must have been around three o'clock I would say, or so.

Q. That was three a.m.? A. Yes.

Q. What did you do when you got to the Players Club?

A. Curley and I walked in and Pat was sitting there with someone else when we came in, and Curley and I sat down and we all had a drink and Curley said that he thought that Pat should go home, and Pat said she didn't care to go home right then.

Q. What occurred after that, if anything?

A. Pardon?

Q. What happened after that?

A. Well, he, she said that she didn't care to go, and he said well, he figured she had had enough to drink and she should go so he took her by the arm and took her off the stool and took her out.

Q. And what did you do after that?

A. After they left why there was another girl there. I finished my drink and I drove this other girl down to the Cowtown and then I went on home.

Q. Did you see Mr. Urban when he pulled Miss Cathey off [154] the, did you see Mr. Urban when he pulled Miss Cathey off the stool?

(Testimony of Sherry Renae Yendes.)

A. Well, I was standing right there with him. He took her by the arm and——

Mr. Taylor: Just a moment. Just a moment. Just a moment. I am going to object to the question as leading, your Honor, ask that the answer be stricken.

The Court: The——

Mr. Taylor: The jury be instructed to disregard the testimony.

The Court: Yes, the answer will be stricken and the objection sustained.

Mr. Stevens: You will have a difficult time, Mr. Taylor, Miss Yendes can't hear you. If you would like to object maybe you should come up here also.

Mr. Taylor: Maybe with my hoarseness I had better.

Q. (By Mr. Stevens): What did you do when you went into the Players Club?

A. Curley and I walked into the Players Club and we sat down. Pat was sitting there with somebody else and he said that we all had a drink and then he asked Pat to go home and she said that she didn't want to go home, so he grabbed her by the arm and said, well, I think you should and said something else, but.

Q. What else did he say? [155]

A. Well, he called her a name.

Q. What name did he call her?

A. He called her a bitch.

Q. And did you see him, or did you——

(Testimony of Sherry Renae Yendes.)

Mr. Taylor: Just a moment.

Mr. Stevens: I think this is a repeat. May I finish my question this time, your Honor.

The Court: There is nothing before the Court. I think you are questioning the witness, Mr. Stevens.

Q. (By Mr. Stevens): Did you see them after that?

A. No, I never saw Pat after that.

Q. Where were you when this took place that you just told us, were you still at the bar?

A. When this took place?

Q. Yes. A. Yes.

Q. And what did you do when they left?

A. Well, I finished my drink and I walked outside because I knew that they didn't have a car or anything because I had driven Curley down and I was going to drive them home, but they were gone, so I figured they had taken a cab.

Mr. Stevens: Thank you very much. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor: [156]

Q. Miss Yendes, what was Pat Cathey's condition at the time that Mr. Urban, what was Pat's condition as to sobriety when you and Mr. Urban went to the Player's

A. Well, I don't understand you.

Q. Well, was Pat Cathey drunk or sober when you saw her at the Player's?

(Testimony of Sherry Renae Yendes.)

A. When I saw her at the Players she was pretty well drunk.

Q. And drunk enough that she should go home?

A. No. I had been drinking.

Q. No, I mean was she drunk enough that she should be taken home? A. Yes.

Mr. Taylor: That's all.

Redirect Examination

By Mr. Stevens:

Q. What was your condition at that time, had you been drinking also?

A. Yes, I had been drinking a little in the evening and then I had a few drinks with them.

Q. And what was Mr. Urban's condition?

A. He had had a few drinks but I wouldn't say that he would be drunk.

Mr. Stevens: Thank you.

Mr. Taylor: That is all.

(Witness excused.) [157]

The Court: Will counsel, please, approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: The Court at all times has been reluctant to interfere in the trial of a case and the examination of the witnesses and I am just wondering whether it would be well to recall this last wit-

ness or not to show whether there were any marks or abrasions on Miss Cathey at that time, or maybe the government has other witnesses. It can't help but strike the Court as maybe being quite pertinent due to the hour. As I say, the Court doesn't know what other witnesses the government may have. I wish to make that comment and do as you like.

Mr. Stevens: The next witness that is coming, your Honor, was to cover that point.

Mr. Taylor: I doubt very much if there is any necessity of recalling this witness.

The Court: Very well.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:)

Mr. Stevens: Again I apologize to the Court for the delay. The witness is on call and did not come up.

The Court: Very well, Mr. Stevens. [158]

Mr. Stevens: Your Honor, there is a matter I would like to take up out of the hearing of the jury any way, if the Court would permit that perhaps we could take it up at the bench if the Court would prefer.

The Court: I could excuse the jury if you thought it might be five or ten minutes before the witness is ready.

Mr. Stevens: I believe——

The Court: I will excuse the jury and we can take up that matter. Members of the jury, once

more I admonish you that you are not to discuss the subject matter of this trial with anyone; do not let anyone discuss it with you; do not listen to any conversation concerning the subject of the trial; do not form or express any opinion until the case is finally submitted to you. You are excused for ten minutes.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the hearing and presence of the jury:)

Mr. Stevens: Your Honor, we have a witness subpoenaed for the government who appeared before the grand jury and has been served with a subpoena to appear here. She was actually served with a subpoena to appear here last Monday and has failed to report into our office and we now have information, although not completely substantiated, that she is no longer in the Territory and we would like to ask the Court to consider Rule 17 and issue a contempt citation for [159] this witness to appear.

The Court: Based upon the statement of the government attorney, the Court will issue such.

Mr. Stevens: Would the Court prefer to see the service of the Marshal on the subject?

The Court: I believe that I may take the word of the United States Attorney on that subject.

Mr. Stevens: Thank you, your Honor. Then if, I do not know what the Court would like to do. I would prefer to keep the matter with the least notoriety possible. I will provide the Court with the

name of the individual and shall we prepare the citation from our office, your Honor?

The Court: You may prepare it and issue.

Mr. Stevens: Thank you.

Mr. Taylor: If the Court please, I believe we would like to know which witness it is.

Mr. Stevens: I will be glad to tell Mr. Taylor and give him a copy of the citation.

The Court: Satisfactory, Mr. Taylor?

Mr. Taylor: That is all right.

The Court: Now, gentlemen, shall we take a five minute recess?

The Clerk: Court is recessed for five minutes.

(Thereupon, at 3:50 p.m., the Court took a recess until 3:55 p.m., at which time it reconvened and the trial of this cause was [160] resumed.)

The Clerk: Court is reconvened.

The Court: Let the record again show the presence of the defendant and his counsel; and the government attorney.

Mr. Taylor: We will stipulate as to the presence of the jury, your Honor.

Mr. Stevens: We will also.

The Court: Very well. Proceed.

GEORGE E. HARETOS

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. George E. Haretos.

Q. Where do you live, Mr. Haretos?

A. Lacey Street Hotel.

Q. Here in Fairbanks? A. Fairbanks.

Q. Did you know Pat Cathey? A. I did.

Q. And when is the last time you saw Pat Cathey?

A. Somewhere in the last part of January or around the first week in February.

Q. And where was that?

A. At the Players Club. [161]

Q. Is that the Club out on Gaffney?

A. Yes, it is.

Q. What time was it when you saw her there?

A. Oh, early in the morning, somewhere around two-thirty, two o'clock.

Q. Who else was there, if there was anyone?

A. Well, the fellow I was with, Jim Murray.

Q. Were there any other people in the bar?

A. Well, there were several there but I didn't know them outside the bartender, of course.

Q. Did you see Pat Cathey there yourself?

A. I was sitting next to her.

Q. And where was that?

(Testimony of George E. Haretos.)

A. On the right side of the bar as you go in.

Q. How long were you there at the bar with her?

A. Possibly forty-five minutes, an hour and fifteen minutes.

Q. Did you notice her appearance at all?

A. No, she looked all right. I mean I didn't see nothing wrong with her.

Q. Was there anything wrong with her lips at the time? A. Not that I noticed.

Q. Did you notice any bruises on her nose?

A. No, sir.

Q. Were you with her? A. No. [162]

Q. Had you known her before that night?

A. Yes.

Q. Well, while you were there at the bar, did you buy her a drink or anything like that?

A. I did.

Q. Did you see her leave at any time?

A. Yes, I see her go out with somebody, but I didn't recognize the fellow she went out with, and I didn't know there was any trouble of any sort, but the girl did try to come in the door. She did get in.

Q. Just a minute, you said she left the Players Club, did she; she went outside?

A. Yeah, she went outside with somebody. I didn't notice who she went out with.

Q. Then what happened after that?

A. She tried to come back in again. She got inside the door and that is as far as she got, an arm reached in and pulled her out.

Q. What did you do at that time?

(Testimony of George E. Haretos.)

A. Well, I seen somebody trying to take her by force so I got up to help her and I was told, I was called back and told be careful, it might be more than one party out there, so the time it took Micky to warn me to be careful and the time I got out there, all I seen was a cab pulling away with somebody beating this girl up behind in the back seat of the cab. [163]

Q. Did you see what kind of a cab it was?

A. Well, it was gray and blue, kind of a light gray top and blue body.

Q. And Pat and whoever this was that she was with at the time, did you see them outside the Players Club?

A. No, they were already in the cab by the time I got out there. The cab was pulling away.

Q. How long had you known her before that night?

A. Oh, I would say some time during the early fall of '54.

Q. Did you see her around the Players Club before? A. Oh, yes.

Q. What type of person was, was she when she was at the Players Club?

A. Oh, I would say she was quite a drinking girl.

Q. Did you notice her, the appearance of her clothing on the night that you saw her the last time?

A. Yes, she was neat.

Mr. Stevens: Your Witness, Mr. Taylor.

(Testimony of George E. Haretos.)

Cross-Examination

By Mr. Taylor:

Q. What time did you go to the Players Club?

A. I beg your pardon.

Q. What time did you go to the Players Club?

A. Oh, sometime after midnight. [164]

Q. What time did you say this affair took place?

A. To the best of my knowledge between twelve-forty-five, twelve-fifteen, one-thirty, somewhere around there, two o'clock.

Q. Had you had several drinks while you were there? A. Possibly.

Q. What were you drinking?

A. Well, a tall glass of chowder.

Q. What was that drink?

A. Old Chowder, high-ball.

Q. What proof is that? A. Eighty-six six.

Q. You drink quite a lot?

A. Oh, I wouldn't say so.

Q. You say you would or you wouldn't?

A. Well, I don't over-indulge, if that is what you mean.

Q. Had you had several that night?

A. Possibly.

Q. Where had you been prior to going to the Players Club?

A. Out, out to lunch I believe, or dinner.

Q. Did you have some drinks with your dinner?

A. I believe I had a martini.

(Testimony of George E. Haretos.)

Q. And where did you have dinner?

A. At Jimmy Lees, I believe.

Q. Do you recall in a specific number the amount of [165] drinks that you had had that evening?

A. No, I don't believe I ever counted my drinks.

Q. What time did you go out for dinner?

A. Late, possibly ten-thirty.

Q. Did you have some special interest in Pat Cathey?

A. No, none whatsoever.

Q. Are you a married man?

A. No.

Q. Did you, could you explain to the Court and Jury your reason for observing her so closely?

A. Well, she was a congenial person and I did know her. I mean I had met her in there in the Players. She used to be in the Players Club quite a bit. She used to go around with this entertainer by the name of Ted Taylor when he was doing the show at the Talk of the Town and I was acquainted with him and I got acquainted with her also.

Q. You say that fellow's name was Ted Taylor?

A. I believe so.

Q. How long did you say you had known her prior to this time?

A. Early last fall of '54.

Q. Early, that would be September?

A. Somewhere around September, October.

Q. And did you know her here in Fairbanks?

A. That is the only place I ever knew her was in Fairbanks. [166]

Q. You didn't know her prior to coming to Fairbanks?

A. No.

Q. You say that was in September?

(Testimony of George E. Haretos.)

A. I can't be definite. Sometime in the fall.

Q. Could it have been late as November?

A. Possibly.

Q. How did you happen to meet her?

A. At the bar.

Q. Which bar, do you recall?

A. Either the Talk of the Town or the Players Club.

Q. How many times did you see her during your acquaintanceship?

A. Oh, possibly a dozen times.

Q. A dozen times, and during all of those times would you say she was a congenial person?

A. Well, with me she was.

Q. Did you ever see her when she wasn't congenial with any person?

A. Can't recall if I ever have.

Q. Did you ever see her in any fights or in any quarrels with any person?

A. No, sir, I never saw that.

Q. Now, you stated that you saw her leave; was she staggering somewhat when she left?

A. No.

Q. She wasn't staggering? [167]

A. If she was staggering she certainly walked pretty straight.

Q. You made the statement during direct examination, she was quite a drinking girl?

A. Yes; she tipped quite a few glasses.

Q. And had she tipped quite a few glasses this particular evening?

(Testimony of George E. Haretos.)

A. She wasn't, no, she didn't.

Q. Beg your pardon?

A. She didn't. No, she didn't. She had several drinks but she wasn't intoxicated. She had no appearance of being intoxicated.

Q. You observed her very closely and you say she was not intoxicated that evening, is that your testimony?

A. I said she didn't appear to be intoxicated. Whether she was or not, I didn't take her out and make her walk a straight line.

Q. You saw her tip several glasses on that evening?

A. That is correct.

Q. You have an estimate as to how many?

A. I beg your pardon.

Q. You have an estimate as to how many glasses you saw her tip that evening?

A. No. She probably had two or three.

Q. Two or three?

A. That is that I noticed. After all, I wasn't paying [168] no direct attention to her.

Q. Did you see her and the party she was with, go out the door?

A. I seen, I see two people go out. I see two, this Cathey girl and some man go out together.

Q. And you watched them go out?

A. Yes, I watched them go out.

Q. And then you saw her again after that?

A. Yes; but in a few minutes or less, more or less.

Q. It was minutes you saw her?

(Testimony of George E. Haretos.)

A. I can't say. All I know is she tried to get back in the door again. She was pulled back out bodily.

Q. While you were observing this, did you notice anyone else going out the door? A. No.

Q. Did you see any other person leave immediately prior to her coming back in or immediately after her coming back in and being taken out?

A. No.

Q. Didn't see anyone leave at all?

A. No, except them two people that left, I mean Cathey and the man she went out with.

Q. Weren't there other women in the Players Club that evening?

A. Well, there was a girl that worked there by the name [169] of, I believe her name is Catherine Coffin. I don't know if she was there at the present time, at that present moment.

Q. Did you happen to see a tall, blonde girl in there that evening?

A. Oh, yes, yes, I did.

Q. And did you see her leave?

A. No, I didn't see her leave.

Q. Do you know when she came in?

A. Well, as I recall this Cathey girl come in with this other party. There was a, three people including Cathey. This blonde girl and another man and Cathey.

Q. The blonde girl then you refer to, came in with Pat Cathey? A. That is correct.

(Testimony of George E. Haretos.)

Q. Did she leave and come back to your knowledge?

A. No, not to my knowledge, sir. What did happen was the other people stayed there and Cathey and this other man went out.

Q. Did you see the man that Pat Cathey went out with come in? A. Yes, I seen him.

Q. Did he come in alone?

A. Yes, I believe he come in alone. I didn't pay no particular attention to him. I didn't recognize him.

Q. You don't know then whether he came in with a party [170] or not, with a group of people or one other person or not?

A. Are you talking about the fellow that brought the girls in, or the fellow that came in later?

Q. The fellow that came in and took Pat Cathey out?

A. No, he didn't come in with a party.

Q. Did he come in with any other person to your knowledge? A. No.

Q. You can be sure that he didn't?

A. Reasonably sure. I didn't see anybody come in with him.

Q. Were you looking the women over in the place that night pretty well?

A. No, because I know them all. Some stranger I might have.

Q. By that statement you know them all, you mean that you know all of the women in Fairbanks?

A. Well, I lived in this town for the past seven

(Testimony of George E. Haretos.)

or eight years and after all, it is a small community.

Q. And of the people that come in and out of the service here and of the people who come in and out through the business season, working season, you know the women or you imply that you know all the women that might come in and out of there?

A. I am not implying I know them all, but if I met a person once, I remember I met them and after all, you do meet quite a few people here, everybody coming and going. [171]

Q. You mean by that—you mean that you would know the people who habituated or fairly regular customers of the Players Club, is that it?

A. That is about the size of it.

Q. You didn't see the party that Pat Cathey went out with that evening come in with any other person, is that correct?

A. I, in other words you tell me that the party that she went out with didn't come in with anybody else, is that what you are implying, too?

Q. I am asking you, did he or did he not come in with another person?

A. I didn't see him come in with another person.

Mr. Miller: I believe that is all the questions I have.

Mr. Stevens: Thank you. That is all. Thank you very much.

(Witness excused.)

ROSE McGRAW

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Rose McGraw. [172]

Mr. Taylor: What is the name?

Mrs. McGraw: Rose McGraw.

Q. (By Mr. Stevens): Where do you live, Mrs. McGraw? A. Golden Heart Trailer Court.

Q. That is here in Fairbanks, is it?

A. Yes.

Q. Did you know Pat Cathey? A. Yes.

Q. And do you know Mr. Urban? A. Yes.

Q. Do you know where Pat Cathey lived during the last period when she was alive?

A. She was living at the Alibi.

Q. And where was that in the Alibi?

A. In the back room.

Q. Where is that room located in relation to the bar, if you know?

A. Going in it would be the left of the bar.

Q. How long did you know Pat Cathey?

A. We met about the first of November, '54.

Q. 1954? A. '54.

Q. And how long have you known Mr. Urban?

A. We met him at the same time. [173]

Q. By we? A. My husband and I.

Q. Did you know them well?

(Testimony of Rose McGraw.)

A. Fairly well. We went to the Alibi quite a bit.

Q. What did you do when you were at the Alibi, just generally when you went there?

A. Usually sat and talked and had a few drinks.

Q. Were you ever in this room that you stated that Miss Cathey lived in? A. Just once.

Q. And when was that?

A. About a month prior to when Pat died.

Mr. Taylor: Pardon me, prior to what?

Mrs. McGraw: About a month before Pat died.

Q. (By Mr. Stevens): Were you there at the Alibi Club during the month of January?

A. Yes, we were.

Q. Do you recall any of those occasions when you went there?

A. We were there the Friday and the Saturday night before she died.

Q. On Friday night before she died, what time did you go there?

A. Around six o'clock in the evening. [174]

Q. Was there anyone else there when you went there? A. I don't remember.

Q. By we?

A. My husband and I. Curly was there. Curly was tending bar.

Q. Did you see Pat Cathey at that time?

A. No, we heard her in the back room.

Q. What did you hear?

A. She sounded like she was sick. She wasn't talking right and she was moaning and groaning.

(Testimony of Rose McGraw.)

Q. Did you have any conversation with Mr. Urban at that time?

A. Yes, we asked him how come he had been closed and what was the matter with Pat.

Q. And what did he tell you at that time?

A. He said they had both——

Mr. Taylor: Just a moment, please. If the Court please, before we proceed any further I would like to have the date of this conversation established a little closer. She has stated on a Friday but not what day of the month it happened.

Mrs. McGraw: I believe that was the 26th of January. That was the Friday before she died.

Mr. Stevens: Thank you. Now would you tell us the conversation, please? [175]

Mr. Taylor: Well, what date did she die? What day of the week did she die?

The Court: Mr. Taylor, as I understand it, the witness has testified that this occasion was Friday, the Friday before Cathey died. That is her statement. You may proceed.

Q. (By Mr. Stevens): Would you tell us the conversation, please?

A. Curly said that he and Pat had both been sick with the stomach flu and Pat was in bed with the stomach flu.

Q. Was there any further conversation at that time?

A. I said was she awfully sick and he said no, she was just lazy and pretty soon he said he would shut her up and he went in and got, went over to

(Testimony of Rose McGraw.)

the cash register and got a bottle of pills and he said the Doctor had left those for her and went back to the back room with one of those pills and she shut up.

Q. Did you, did you hear any conversation or any words that Mr. Urban said that night to Miss Cathey? A. No.

Q. How long were you in there?

A. About an hour.

Q. Did you go in to see Miss Cathey?

A. No. I asked him if I could see her and he said no, she wasn't covered up.

Q. Did you, what else went on that night while you were [176] there, the Friday night, was there anything else that occurred?

A. Meaning what?

Q. Did you hear anything further, or——

A. Just after he took the pills in she shut up immediately so that it seemed like awfully quick for just taking a pill.

Mr. Miller: If the Court please, I am going to object to the answer and ask that it be stricken upon the grounds that it is a mere presumption and conclusion that should not be allowed.

The Court: I will strike that portion that says it seemed awfully quick, just taking a pill.

Q. (By Mr. Stevens): You stated you heard some noises from the room? A. Yes.

Q. And other than the moaning you heard, did you hear any other sound?

A. She was moaning and it sounded like she

(Testimony of Rose McGraw.)

was kicking the wall or something. She didn't sound conscious.

Q. You stated that you returned there the next evening? A. Yes.

Q. What time was that?

A. About seven o'clock the next evening.

Q. Was your husband with you again then?

A. Yes, my husband was with me. [177]

Q. And was Mr. Urban there?

A. Yes, he was.

Q. What occurred that evening, if anything?

A. Well, we went back that evening because we were wondering how she was and she hadn't sounded just right to us for just having stomach flu and we were wondering how she was and if she was better. We asked Curly if she was better. He said yes, she was, she had been sitting up but she was still moaning and groaning and kicking and carrying on. I asked him what was the matter. He said she just wanted a drink of water, wanted him to come in and cover her up.

Q. That was on Saturday night? A. Yes.

Q. Did you see her on Saturday night?

A. No, we didn't.

Q. How long did you stay Saturday night?

A. Not very long.

Q. Do you know where Mr. Urban lived during that time?

A. As far as I know he was living at the Alibi, too.

Q. You stated that some part of the discussion

(Testimony of Rose McGraw.)

pertained to having the club open? A. Yes.

Q. Which night was that?

A. Friday night I am quite sure.

Q. And what was that part of the [178] conversation?

A. He said that they had been closed for a week because that they both had stomach flu and had been sick and they had had the doctor out and he was feeling better.

Mr. Stevens: Thank you very much, Mrs. McGraw. Your witness, Mr. Miller.

Mr. Miller: We have no questions.

(Witness excused.)

Mr. Stevens: Call Mr. Jennings.

MARVIN T. JENNINGS

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name for us, please?

A. Marvin Thomas Jennings.

Q. Where do you live, Mr. Jennings?

A. Twenty-second and Lisga.

Q. What is your business?

A. I am driving a cab now.

Q. Who for? A. Radio.

Q. Were you driving Radio Cab in January of this year? A. Yes, sir.

(Testimony of Marvin T. Jennings.)

Q. Do you know Mr. Urban?

A. I know him as Curly, yes, sir.

Q. As Curly Urban or just as Curly? [179]

A. Just as Curly.

Q. It is the same Mr. Urban that is here now?

A. Yes.

Q. During the month of January did you have him as a passenger in your cab? A. Yes, sir.

Q. Where did you pick him up?

A. In front of the Players Club.

Q. You remember what time it was?

A. Oh, it was early in the morning.

Q. Was there anyone with him?

A. Yes, sir.

Q. Where were you at the time he got in the cab? A. I was in the cab myself asleep.

Q. And what happened when he came to the cab?

A. Well, I woke up. The door was opened and he was putting a woman in the back seat and he pushed in on the seat and I told him wait a minute, and I had, I would have him slide over in the seat and I did and he got in.

Q. What did you do then?

A. Then I started back out and he said twenty-third street.

Q. And you were parked in front of the Players Club? A. Yes, sir.

Q. What is the street out there? [180]

A. Gaffney and Cushman.

Q. Is that about Fourteenth?

A. It would be Thirteenth Street, I guess.

(Testimony of Marvin T. Jennings.)

Q. And what occurred, if anything, as you proceeded?

A. Well, I started toward Twenty-third Street and he mentioned something about her not setting with him at the bar and he started cussing her and he hit her a few times.

Q. And did you hear what was going on in the back?

A. I heard him hit her. I didn't see him hit her, but I heard him hit her.

Q. Did you hear any other sound?

A. Oh, she was groaning or crying or something. I don't know which.

Q. What else occurred as you went along that you remember?

A. Oh, he knocked her down on the floorboard and told her to stay there. Then he picked her up, put her back up on the seat, I guess, and he knocked her up against the door once.

Q. And how long would you say that trip took you from Thirteenth to Twenty-third?

A. Oh, approximately five minutes.

Q. Where did you go to at Twenty-third?

A. Alibi.

Q. The Alibi Club? A. Yes, sir. [181]

Q. And what happened there?

A. Well, he said, he give me three dollars and said wait until I unlock the door, and he unlocked the door and he came back and got her out of the cab and pulled her in.

Q. How did he get her out of the cab?

(Testimony of Marvin T. Jennings.)

A. By her hair.

Q. How did he pull her in?

A. By her hair.

Q. Did you watch this take place?

A. Yes, sir.

Q. And then what occurred?

A. Then I backed out and came on to town, I guess. I don't know where I went from there.

Q. Did you see them enter the Alibi Club?

A. Yes, sir.

Q. When you first were aware of these people getting in the car, did you observe the woman at all?

A. No, I don't, I don't remember paying any strict attention to it, no.

Q. Did you help him?

A. I helped him slide her over on the seat, yes, sir.

Q. Did you hear anything that was said in the back seat on the way down?

A. Nothing other than something about her not setting with him at the bar. That was all. [182]

Q. Did you see her as she got out of the cab?

A. Yes, sir.

Q. What did you see at that time?

A. Well, she was setting on the back seat and she had blood on her face and run down her clothes.

Q. Was there a light in the back of your cab at that time? A. Yes, sir.

Q. When did it come on?

A. When the door was opened.

(Testimony of Marvin T. Jennings.)

Q. Did you see her attempt to walk at any time?

A. No, sir.

Q. Did you observe her condition as she got out?

A. She seemed to be passed out.

Q. And what was the ground condition out there at that time, was there snow on the ground?

A. Truthfully, I don't remember.

Q. Did you report this trip in?

A. Yes, sir.

Q. At approximately what time in the morning was it, do you remember?

A. I don't know, around three or four, I guess.

Q. What was the number of your cab?

A. No. 20, Radio.

Q. Did you notice her appearance as you helped slide her [183] over on the seat?

A. No, sir, I didn't.

Q. Did you notice any blood at that time?

A. No, sir, I didn't.

Q. What color is your cab?

A. Blue and gray.

Q. Did you know the woman?

A. I knew her as Pat.

Q. Had you seen her before?

A. Yes, sir, I seen her at the Alibi Club.

Q. Do you know whether or not she had any connection with the Alibi Club?

A. No, I didn't.

Q. You just seen her there?

A. I thought she was Curly's wife.

Q. At that time did you think that?

(Testimony of Marvin T. Jennings.)

A. Yes, sir.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Miller:

Q. How long did it take you to travel from the Players Club to the Alibi Club, Mr. Jennings?

A. Approximately five minutes.

Q. Did you testify previously on direct examination that you helped Curly put Pat Cathey in the back of your cab? [184]

A. Well, he put her in. I helped slide her over on the seat so he could get in.

Q. You helped slide her over? A. Yes, sir.

Q. Was she passed out then?

A. Truthfully, I suppose she was. I don't know. Maybe she was too drunk. I don't know to be truthful.

Q. Did you smell alcohol on her breath?

A. No, sir.

Q. You assumed that she was drunk?

A. Well, truthfully I never paid that much attention to her. I just grabbed her by the arms and helped him slide her over and he got in.

Q. How long was she unconscious to your knowledge? A. Oh, I don't know.

Q. Do you know if she ever came to?

A. Oh, I don't even know that. Maybe she wasn't unconscious. I don't know.

Q. Are you telling this Court and the jury that

(Testimony of Marvin T. Jennings.)

this man was beating an unconscious woman? Is that your contention?

A. No, I say I don't know if she was unconscious or not when she got in.

Q. She slid off on the floor you stated, didn't you? A. You mean during the trip?

Q. Yes. [185]

A. She was on the floorboard. I don't know.

Q. Did she ever do any talking?

A. She was groaning and moaning or something. I never heard her say anything.

Q. Can you testify here that he knocked her on the floor, or due to the rough streets or due to stops or something like that she slid to the floor; can you testify definitely what occurred?

A. From what I heard, he told her to get down on the floor and stay there. I suppose he knocked her or pushed her, one.

Q. Did you hear any slap or impact when she went to the floor?

A. I heard him slap her several times.

Q. Were they sound slaps or something you might be trying to bring a person to or something like that?

A. They sounded pretty rough for that.

Q. Now, do you know whether or not he was trying to keep her in the seat or do you know just exactly what was occurring in your cab?

A. All I know is from what he said.

Q. And did he do a lot of talking?

A. Quite a bit, yes, sir.

(Testimony of Marvin T. Jennings.)

Q. And to that you have stated she wouldn't set with him, was that the situation? [186]

A. He kept mentioning something about her not setting with him in the Players Club, seemed to be what he was angry about.

Q. Did you see him go in? A. No, sir.

Q. Do you know how long he was there?

A. No, sir.

Q. When you arrived at the Alibi Club could you see the extent of the damage that was done to her face?

A. All I seen, she had blood on her face and on the front of her clothes.

Q. Where was that blood coming from, do you know? A. Her nose it looked like.

Q. From her nose? A. Yes, sir.

Q. What color was the coat that she had on that evening, Mr. Jennings?

A. I think she had on a red sweater, I don't know for sure. Her coat was open. I don't know what color her coat was.

Q. Now, what shift did you work?

A. Six to six, nights.

Q. Was it pretty dark at that time?

A. Yes, sir.

Q. Was the Alibi Club open when you took them home? A. No, sir. [187]

Q. Was there any lights around the Alibi Club?

A. No, sir, I don't think so.

Q. Did you get out and help Mr. Urban into the

(Testimony of Marvin T. Jennings.)

Alibi Club? A. No, sir.

Q. Then would you explain to the Court and jury just how you saw that blood on her sweater and how you know that he drug her in the place by the hair of the head?

A. Well, when he got out of the cab he opened the back door, the inside light comes on, see, that is when I seen her face and then I seen from my headlights when he took her in.

Q. And how was this procedure being done?

A. He pulled her in by her hair.

Q. She wasn't walking at all?

A. No, sir.

Q. And did he have her by the hair on the back of her head or on the top of her head or just where was his hair?

A. Truthfully, I don't know. All I know, he had her by her hair.

Q. Did you happen to notice the snow on the ground that night?

A. No, sir, I didn't particularly pay any attention to that.

Q. Don't remember if there was snow on the ground that night or not? [188]

A. No, sir.

Q. You don't know if he had her by the back of the coat taking her in or just exactly how he was taking her in, do you?

A. All I seen was he had a handful of hair.

Q. You had formed an opinion prior to him taking her in, had you not, Mr. Jennings?

A. I seen when he reached her in the cab and

(Testimony of Marvin T. Jennings.)

got her, he got her by the hair. Then he kept going with her.

Q. Did he put his arm around behind her when he picked her up? A. No, sir.

Q. Just took her by the hair, by the top of her head, is that correct? A. Yes, sir.

Q. Couldn't have had her jacket?

A. If he did, I didn't see it.

Q. Actually when it comes right down to the matter, you don't know just exactly how he took her out of the cab, do you?

A. I know he had one hand full of hair. I don't know if he had both of them full or not.

Q. You don't know what he was doing with the other hand?

A. The last I seen he had both of his hands on her hair, could have changed, I guess.

Q. Can you definitely testify that she didn't have on a parka? [189]

A. No, sir, I can't. Whatever kind of coat she had on it was open.

Q. The parka wasn't up over her?

A. No, sir, and it wasn't fastened in the front. It was open.

Q. Had you been drinking that night?

A. No, sir.

Q. I will ask you if you have ever been intimate with Pat Cathey? A. No, sir.

Q. How long have you known her?

A. I have just seen her a few times out to the Alibi Club, stop in there with a passenger.

(Testimony of Marvin T. Jennings.)

Q. Have you ever hauled her in your cab prior to this time? A. No, sir, not that I know of.

Q. Do you know how she got to the Players Club that evening? A. No, sir.

Q. Did you see Curly Urban go in there, into the Players Club? A. No, sir.

Q. Did you see Pat Cathey after the time you let her out at the Alibi Club?

A. No, sir. [190]

Q. When Curly was putting her in the cab, do you remember how he was proceeding to do that?

A. Well, we opened the door, he put her in on the seat and he couldn't get in, there wasn't enough room, and I told him to wait a minute, I would help him and I got her by the arm and he pushed on her or something, I don't know, slid her over and he got in, see.

Q. Where did she lay her head at that time?

A. She was setting up in the seat.

Q. Were her eyes closed?

A. Truthfully, I don't know.

Q. You have testified that you heard her fall off on the floor but you didn't see any of this, is that correct? A. Correct.

Q. All you are going on then is what you heard?

A. Yes, sir.

Q. What model cab do you have, sir?

A. '52 Chrysler.

Q. Those streets pretty rough?

A. Well, Cushman is not so bad, no, sir.

Q. Now, can you testify definitely that you heard

(Testimony of Marvin T. Jennings.)

Curly slapping her a blow, or slapping her with force enough that it would do her bodily injury?

A. Well, he hit her one time or slapped her or something, she hit the door awful hard. [191-2]

Q. Now, was that at any place where you made a turn? A. No, sir.

Q. Was that at any point where something of the car might have caused her to fall over?

A. No, sir.

Q. Is there any way that you can be positive that it was due to a blow that she went over against the door?

A. He either slapped her or hit her, I don't know which.

Q. But you didn't see any of it?

A. No, sir.

Q. You, from the sounds that is what you are going by? A. Yes, sir.

Q. And you can't tell by the sound exactly what force was used, is that correct?

A. That is correct.

Q. If he was using his open hand it would make a lot more noise than his fist, is that true?

A. Yes, sir.

Q. Now, during this whole thing you are positive that she was unconscious, is that correct?

A. No, sir, she appeared to be conscious, unconscious when he got her out of the car. I don't know what condition she was in when he put her in the cab.

(Testimony of Marvin T. Jennings.)

Q. Did she appear to be unconscious when he put her in the cab? [193]

A. Truthfully, I didn't pay that much attention. I just figured she was drunk. I don't know if she was unconscious or not.

Q. If she was drunk though, in your opinion she was passed out, is that correct?

A. I don't know what condition she was in when she got in the cab.

Q. Now, you have based a lot of opinions here today and you have stated them; surely you can state an opinion as to why you believed the woman to be drunk when she got in that cab?

A. Well, a lot of people can't get around very good when they are drinking quite a bit, can't walk or move around too good, so I figured that is the reason she didn't get over on the seat.

Q. But you wouldn't dare venture a statement whether she was passed out from drinking or whether she was solely conscious?

A. No, sir, I wouldn't. I knew she wasn't getting around very good. I knew she didn't move over on the seat. I helped slide her on the seat.

Q. You are just not positive what did happen in the back seat of your cab; you don't know if Curly was trying to hold her in the seat or exactly what did happen, isn't that the case?

A. I would say he hit her a few times. [194]

Q. You would say, but you don't know positive, do you?

A. He had to hit her, I know that for a fact. He

(Testimony of Marvin T. Jennings.)

knocked her on the floor board and he knocked her against the door. I knew she couldn't fall against the door that hard.

Q. You knew she didn't? A. Yes.

Q. How could you tell she hit the door pretty hard? A. She hit the door awful hard.

Q. What part of her hit the door?

A. I don't know.

Q. If her shoulder would have hit the door, would that have alarmed you; would that have made enough noise that you would have noticed it?

A. If she hit the door hard enough, I guess it would.

Q. If her head hit the door that would make quite a lot more noise, isn't that true?

A. True, yes, sir.

Q. Isn't it true that a person under the influence of alcohol if they fall over sitting in a seat and fall over their head will hit a door with a dull thud or hitting the glass, wouldn't that be the same sound that you are referring to? A. Yes, sir.

Q. You can be positive that that didn't happen?

A. Well, I am not positive that that didn't happen, but [195] I know he did hit her because she, he knocked her down on the floorboard a couple of times and told her to stay there and then pick her up and I know he knocked her down there.

Q. You know he did? A. Yes, sir.

Q. Did you see that?

A. No, sir, I didn't see it.

Q. You didn't see any of it? A. No.

(Testimony of Marvin T. Jennings.)

Q. Pretty dark in that cab?

A. Yes, sir, to a certain extent. Street lights only lights you have.

Q. Do you know what part of her head hit that floor?

A. No, sir.

Q. Do you know if her head hit the door?

A. No, sir.

Q. Do you know if her head hit the back of the seat when she slid down in between the seats?

A. No, sir.

Q. The only thing actually that you can testify to, Mr. Jennings, is the fact that she was apparently drunk when she got in the cab, her nose was bleeding when she got out of the cab, and that you heard Curly possibly slapping her to bring her to, isn't that true?

A. Well, I would say he was slapping her awful hard. [196]

Q. How long had you been awake at this time?

A. Oh, he woke me up when he got in the car.

Q. What was the trip immediately prior to that, how long before?

A. Truthfully, I don't know, probably thirty, forty-five minutes.

Q. Did you go to sleep as soon as you came back to the Players Club?

A. We sat around outside, some of us go in bars, the others set in cabs and sleep and wait for calls.

Q. Now, this, this sweater and jacket that you

(Testimony of Marvin T. Jennings.)

mentioned she had on, would you describe that to the Court?

A. I thought she had on a red sweater. I don't know for sure it was red. I thought it was a sweater. I don't know what kind of coat she had on, but it was open.

Q. You are positive it was open in the front?

A. Yes, sir.

Q. Did you, do you know whether it was a zipper opening or button opening or what kind of an opening it had?

A. As well as I remember it had a zipper on it. I don't remember what kind of a coat it was.

Q. It did have a zipper on it?

A. I think it did. I am not positive though.

Q. Was it a long sweater?

A. Waist length, I guess you would say. [197]

Q. By waist, do you mean it covered her hips or it stopped at the belt line?

A. I think she had on a sweater and skirt and she had her sweater in her skirt. I don't know for sure.

Q. Do you know what a parka is?

A. Yes, sir.

Q. Did you look her over very close that night?

A. No, sir.

Q. Could you testify here definitely that she had on or did not have on a parka?

A. No, sir, she didn't have any hood over her head, I know that. I don't know if she had on a parka or not.

(Testimony of Marvin T. Jennings.)

Q. What sort of a blouse did she have on under that jacket that you mentioned?

A. I thought she had on a sweater. I don't know.

Q. Oh, then it is your opinion she didn't have on any coat at all, the garment that you speak of was her only covering to your knowledge?

A. To my knowledge she had on a coat which was open and a sweater. I don't know, it might have been a parka. I don't know.

Q. Did you notice a hood on that parka?

A. No, sir, I didn't see any hood.

Q. What time did you say this took place?

A. Around three or four in the morning. [198]

Q. Now, I believe you have testified previously that this whole affair took five minutes, is that correct?

A. Approximately five minutes.

Q. Have you known Pat Cathey prior to the, prior to your hauling her this night?

A. Only seen her in the Alibi Club a few times.

Q. Do you know her character?

A. No, sir.

Q. Have you ever seen her in a fight?

A. No, sir.

Q. When she got out of this cab, did you notice any red or blue marks on her outside of her bleeding nose?

A. No, sir.

Q. When she got in your cab at the Players Club, Mr. Jennings, did she slide over to the opposite side and Curly get in the vacant space, or did Curly crawl across her?

A. Curly and I slid her over so he could get in.

(Testimony of Marvin T. Jennings.)

Q. Then he slid in after you had slid her over, is that correct? A. After him and I did, yes.

Q. And at that particular time, did you notice any bruises or bleeding or anything about her?

A. No, sir.

Mr. Miller: If the Court please, I wonder if we could have the evening recess because I think at this time [199] we could possibly go into another matter that would take up considerable time with this witness. If there is no objection I see there is about two minutes.

The Court: What is the other matter of inquiry?

Mr. Miller: Well, there is, actually it is background of the witness, more or less impeachment material.

The Court: Are you prepared to go ahead or will it take too long?

Mr. Miller: It will take considerable time.

The Court: I am quite sure that—— (Interrupted).

Mr. Miller: We can certainly question him on that subject if the Court proposes.

The Court: Mr. Stevens, what do you think? It is five o'clock now.

Mr. Stevens: I feel that the Court and counsel have been lenient with the government and we would be inclined to grant the request.

The Court: Recess now?

Mr. Stevens: Yes, sir.

The Court: Members of the jury, again I admonish you not to discuss the subject matter of this

(Testimony of Marvin T. Jennings.)

trial with anyone; and do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion until the case is finally submitted to you. You are excused until ten o'clock tomorrow morning. We will adjourn until ten o'clock [200] tomorrow morning.

The Clerk: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 5:00 p.m., the trial of this cause was adjourned until May 19, 1955, at 10:00 a.m.)

May 19, 1955—10:00 A.M.

Be It Remembered, that upon the 19th day of May, 1955, at the hour of 10 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Clerk: Court is now in session.

The Court: Let the record show the presence of the defendant and his counsel. Let the record also show the presence of the government attorney. Will the Clerk, please, call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Very well. Are the parties ready to proceed?

Mr. Miller: The defendant is ready, your Honor.

Mr. Stevens: The government is ready, your Honor.

MARVIN JENNINGS

the witness on the stand at the time of adjournment,
resumed [201] the stand for further

Cross-Examination

By Mr. Miller:

Q. Mr. Jennings, I believe that you testified yesterday when Mr. Stevens asked you or when I asked you, one, that you knew Pat Cathey, is that true?

A. I knew her as Pat only.

Q. But you now know that her name was Cathey, is that correct? A. Yes, sir.

Q. Did you state the number of times that you had hauled her in your cab?

A. Only once that I remember.

Q. Just once? A. Yes, sir.

Q. I believe you also stated that you had never been out with her, is that true? A. Yes, sir.

Q. The time that you hauled her, do you remember where you hauled her? A. Yes.

Q. Where was that?

A. From the Players Club to the Alibi Club.

Q. That is the only time you have ever hauled her? A. That is the only time I remember.

Q. I will call your attention to the Birdland, do you know where that is in South Fairbanks? [202]

A. Yes, sir.

Q. Did you ever haul Pat Cathey there?

(Testimony of Marvin T. Jennings.)

A. No, sir, not that I know of.

Q. Did you ever meet Pat Cathey there and haul her to another destination?

A. No, sir, not that I know of.

Q. You are able to say under oath that that is the truth? A. If I did, I don't remember.

Q. What is the number of your cab, Mr. Jennings? A. No. 20.

Q. No. 20? A. Yes, sir.

Q. How long have you driven that cab?

A. Since I came back to work in December.

Q. December of 1954? A. Yes, sir.

Q. And where did you come from?

A. You mean my home state?

Q. Well, you stated that you came back in December of '54, from whence did you come?

A. I mean I came back to work for Vic Hart. I worked for Federal Roofing during the summer.

Q. I see. How long have you been in the Territory of Alaska? A. Three years. [203]

Q. You ever been arrested in the Territory?

A. No, sir.

Q. Do you have any charges pending against you now? A. No, sir.

Q. Have you ever been convicted of a crime?

A. Disorderly conduct is all.

Q. Is that in the Territory of Alaska?

A. No, sir.

Q. Did you observe the size of Pat Cathey?

A. Well, I knew she was a pretty big woman. That's all, I mean.

(Testimony of Marvin T. Jennings.)

Q. You helped slide her over in that seat, did you testify to that? A. Yes, sir.

Q. Did you have any estimate as to her weight?

A. No, sir, I would say about a hundred fifty.

Q. About a hundred fifty, what would you say her height was? A. About five, six, I guess.

Q. Now, I believe that you testified that she was taken out of the taxicab by the hair of her head yesterday, is that true? A. Yes, sir.

Q. You also stated that she was drug into the Alibi Club by the hair of her head, is that true?

A. Yes, sir. [204]

Q. By dragging, was her feet dangling behind her? A. Yes, sir.

Q. Or was she walking?

A. She was, he was dragging her.

Q. Dragging her out, right. Do you know which hand he used to drag her in?

A. He was pulling her by her head.

Q. What?

A. He was pulling her by her hair.

Q. Do you know which one of his hands he used?

A. Both of them, I think.

Q. Both hands, she was that big it took both hands to pull her in?

A. Well, I guess it would, yes, sir.

Q. To your knowledge, did that pull her hair out?

A. Well, I don't know. I wouldn't say that.

Q. You don't know at all?

(Testimony of Marvin T. Jennings.)

A. I imagine some of it came out.

Q. Did you see any of it come out?

A. No, sir.

Q. When he got to the door, did you say you helped him at all in this transaction?

A. No, sir.

Q. When he got to the door, how did he open it?

A. He pushed it open with his back.

Q. Was there a knob or some sort of a lock on that door? [205]

A. Not on the outside of the door, I don't think.

Q. Didn't you testify yesterday that the place was locked?

A. Yes, sir, he got out and unlocked the door first.

Q. And then he came back and got her?

A. Yes, sir.

Q. He didn't open the door prior to getting her?

A. No, sir, I think he just unlocked it. He didn't open the outside door anyway, I know.

Q. How many doors were there on the building?

A. Two.

Q. Two. Did he have the outside or the inside door locked?

A. It was the inside door I suppose. I don't know how he had it locked.

Q. You are assuming then that it was locked?

A. Yes, that is what he said.

Q. Oh, he told you that it was locked?

A. He said he had to unlock the door.

(Testimony of Marvin T. Jennings.)

Q. He went through it, he opened the back door with his back, the outside door with his back?

A. Yes, sir.

Q. And he drug her through by the hair of her head according to your testimony?

A. Yes, sir.

Q. Now, from, from where you were sitting or from where the cab was, how far was it to the door? [206]

A. I was sitting about ten foot from the door.

Q. You were? A. Yes, sir.

Q. In other words, three or four steps from the door?

A. The front of the car was about six, eight, ten foot from the door.

Q. Now, where was, when this door, when he got out, opened the door and got out, the light came on, didn't you testify yesterday that that is the way you saw Pat's face? A. Yes, sir.

Q. Where was Pat?

A. Slumped on the back seat.

Q. She wasn't on the floorboard then?

A. No, sir.

Q. Didn't you also testify yesterday that he said for her to stay down in the floorboard?

A. Yes, sir, he did during the trip.

Q. And when did she get up on the seat?

A. He would pick her up, I suppose.

Q. You suppose, you don't know how she got on the seat?

(Testimony of Marvin T. Jennings.)

A. He told her to get back up on the seat and I suppose he picked her up.

Q. Oh, he told her to get up there and she got up there?

A. He picked her up, I presume, I don't know.

Q. Now, when she fell down between the seat, the two seats, was that prior or after the time she bumped her head on [207] the window?

A. I think she was down on the floor before and after. I don't know for sure.

Q. She was down before and after?

A. Yes, she was on the floorboard a couple of times.

Q. Did, did you hear him pick her up?

A. Well, all I could tell is by what he was saying mostly, you know.

Q. Did you see him pick her up?

A. No, sir.

Q. You testified that she was unconscious when she got in your car or she was passed out apparently?

A. I don't know if she was passed out or maybe she was just too drunk to move around good. I don't know.

Q. You don't know whether she got back up or whether he picked her up; you don't know how she got into the floorboard or back up on the seat, isn't that correct?

Mr. Stevens: I object, multiple questions, your Honor. We ask that the witness be asked one question at a time.

(Testimony of Marvin T. Jennings.)

The Court: I will ask counsel to reframe the question.

Mr. Miller: All right.

Q. (By Mr. Miller): Can you tell the Court and jury how she got back up on the seat?

A. I presume he picked her up. [208]

Q. Can you tell us definitely how she got up on the seat? A. No, sir.

Q. Can you tell us definitely how many times Mr. Urban struck her? A. No, sir.

Q. Can you tell us definitely how she happened to bump into the window or the door? Now tell us definitely under oath positively what happened?

A. He had to have hit her because she couldn't have hit the door any other way.

Q. She couldn't have slumped over being relaxed in that seat?

A. She hit the door too hard for that.

Q. Now, this all took place during the trip?

A. Yes, sir.

Q. How many blocks did you say that was?

A. Approximately ten blocks.

Q. You say it took you five minutes to make that trip? A. Approximately five minutes.

Q. And during that time she was on the floor twice, she was hit against the window once; all the time you were driving, drove ten blocks and you know just exactly what was going on although you never saw anything?

A. Well, all I could tell was by what I [209] heard.

(Testimony of Marvin T. Jennings.)

Q. Is it what you heard or what you presumed?

A. Well, it is what you hear and what you presume, too I suppose.

Q. What is your average speed that you ordinarily drive your cab, Mr. Jennings?

A. You can only drive twenty on Cushman.

Q. What, would you say that is, what distance in miles or half-miles or quarter miles would you say that is?

A. Oh, approximately a mile and a quarter.

Q. Approximately a mile and a quarter between the Players Club and the Alibi Club?

A. Yes, sir.

Q. Would you say that Myrtle Cathey was quite a robust girl, quite stout?

A. Yes, sir.

Q. Have you seen Myrtle Cathey around various places in the City of Fairbanks?

A. No, sir, I don't remember seeing her.

Q. You don't know anything about her personality or disposition then?

A. No.

Q. This particular night when you took this trip you state there was quite a feud going on in the back of your car, is that correct?

A. Yes, sir.

Q. Did you drive slower or faster in order to get those [210] people to their destination?

A. I just drove about five miles over the speed limit.

Q. There was nothing there then that was disturbing you very much, is that correct?

A. Well, it was nothing anyway to me to start with.

(Testimony of Marvin T. Jennings.)

Q. You testified that it took you about five minutes to drive from the Alibi Club to the, or from the Players Club to the Alibi Club, is that correct?

A. Yes, sir.

Q. And it is about a mile?

A. Approximately that, yes, sir.

Q. Then five minutes in driving that mile would be twelve miles an hour, do you suppose that you were driving slower than the speed limit to get there?

A. No, sir, I had to wait on traffic at Gaffney and Cushman, you know.

Q. Did this, were you bothered quite a lot with traffic that hour of the morning?

A. No, sir, not too bad.

Q. Was the stoplight working out there at that hour of the morning?

A. No, sir.

Q. And what was the traffic hazard you speak of?

A. Well, I don't know that there was any traffic hazard. Possibly I did have to wait on a car or two though. [211]

Q. This is another assumption that that is what slowed you down, is that correct?

A. I didn't say it slowed me down. I didn't say it took me five minutes. I said approximately five minutes.

Q. Didn't you say it was traffic that caused you to drive only twelve miles an hour?

A. No, sir, I said drive approximately fifteen,

(Testimony of Marvin T. Jennings.)

twenty miles an hour, but I said if there was any delay it was possibly traffic.

Q. I see. Do you have such occurrences as this in your cab quite often? A. No, sir.

Q. It isn't a customary thing with you then?

A. No, sir.

Q. Once it happens in your cab then you drive slower than the speed limit until you get the person to their destination, is that so?

A. Well, I don't want to get arrested trying to get somebody home.

Q. So you drive slower? A. No, sir.

Q. Then it took you more like three minutes or two and a half minutes, something like that to get to your destination, isn't that true?

A. Possibly between three and five, yes, [212] sir.

Q. During that two and a half minutes, three minutes, you say that this woman's head was bounced against the window, she was down on the floorboard twice, Curly picked her up, put her in the seat, had her in the seat when you arrived at your destination, is that true?

A. Yes, sir. She was in the seat.

Mr. Miller: I believe that is all, Mr. Jennings. Thank you.

Redirect Examination

By Mr. Stevens:

Q. Mr. Jennings, this trip started from in front of the Players Club? A. Yes, sir.

(Testimony of Marvin T. Jennings.)

Q. Is there any stops between the Players Club and the Alibi Club?

A. You have to stop at Gaffney and Cushman.

Q. Is that a stop sign?

A. Yes, sir, you have to stop.

Q. Are there any turns on the way?

A. You have to turn left.

Q. How many times?

A. Once and you have to turn again when you get to the Alibi.

Q. And which way do you have to turn off Cushman when you get to the Alibi Club? [213]

A. Left.

Q. Which side of the cab was Myrtle Cathey on?

A. On the left side.

Q. As Mr. Miller pointed out to you, if you drove that distance approximately a mile in five minutes you would have been averaging twelve miles per hour. Now, were you driving at the same speed throughout the trip? A. Yes, sir.

Q. You had to start off from the Player's Club, didn't you? A. Yes, sir.

Q. You stopped at that stop sign?

A. Yes, sir.

Q. And then you turned left? A. Yes, sir.

Q. Now, did you accelerate as you went down Cushman?

A. No, sir, I just drive fifteen or twenty.

Q. But as you first started off you weren't going fifteen or twenty? A. No, sir.

(Testimony of Marvin T. Jennings.)

Q. You started off from a stop and then accelerated to about fifteen or twenty?

A. Yes, sir.

Q. So, therefore, your five minutes is an approximation, just based upon your experience of driving that distance?

A. Yes, sir. [214]

Q. Did you examine the back of your cab after these people got out at all?

A. Yes, sir; there was blood on the seat.

Mr. Miller: If the Court please, I will object to that answer and move that it be stricken on the grounds it is not responsive to the question.

The Court: It may stand.

Q. (By Mr. Stevens): Did you examine the rest of the rear part of your car at all?

A. No, sir.

Mr. Stevens: Your witness, Mr. Taylor.

Recross-Examination

By Mr. Miller:

Q. Did you stop at Gaffney and Cushman that night?

A. I didn't understand you.

Q. Did you stop at Gaffney and Cushman that night?

A. Yes, sir.

Q. You state that Myrtle Cathey was sitting directly behind you, she was sitting on the left-hand side of the cab?

A. Yes, sir.

Q. You slid her over in the seat yourself, you know where she was sitting?

A. I helped slide her over, yes, sir.

Q. And she was sitting directly behind you in

(Testimony of Marvin T. Jennings.)

the cab? [215] A. Yes, sir.

Q. And you saw her when she, when she opened the door to get out, you saw that her nose was bleeding? A. Yes, sir.

Q. And you state that you saw blood on the seat of the car?

A. Yes, sir, there was blood on the seat.

Q. Did you state in direct examination yesterday that the usual time of driving between the Players Club and the Alibi Club was five minutes?

A. I said approximately five minutes, yes, sir.

Mr. Miller: I think that is all.

Mr. Stevens: Thank you, Mr. Jennings.

(Witness excused.)

VICTOR HART

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name for us, please?

A. Victor Hart.

Q. And what is your occupation, sir?

A. I own the Pioneer-Radio Cab.

Q. Where is that business located?

A. In the Northward Building, Fairbanks. [216]

Q. Do you operate a cab service here in Fairbanks? A. That's right.

Q. Does, do you know the gentleman that preceded you, Mr. Jennings? A. I do.

Q. How do you know him?

(Testimony of Victor Hart.)

A. He is employed by me as a cab driver.

The Clerk: Government's Identification No. 13.

(Taxi record of trip was marked Government's Identification No. 13.)

Q. (By Mr. Stevens): Now, in the course of operating your cab business, do you keep records?

A. Yes, we keep records for about ninety days as required by the police department.

Q. Do you keep any record of individual trips?

A. Yes, we do.

Q. How are those records kept?

A. We make up trip tickets for each individual trip. Then we keep them, at the end of the day we tape them together, keep them for a period of ninety days.

Q. And by what procedure do you get that information from each cab?

A. Well, the driver's destination and location or place of pickup is called in over the radio and the dispatcher [217] in turn writes it on the trip ticket.

Q. This is your business, is it, Mr. Hart?

A. You mean my business writing up the tickets?

Q. No, the cab business itself?

A. That's right.

Q. Are these records kept under your supervision and control at your request?

A. They are.

Q. That is the normal course of your business to keep these records of each individual trip?

A. That's right.

(Testimony of Victor Hart.)

Q. Now, do you know Officer Goodfellow?

A. Yes, I do.

Q. Territorial Police. Has, have you ever conducted a search into these business records of yours accompanied by Mr. Goodfellow?

A. Yes, I did.

Q. And do you remember the, or were you looking for any record pertaining to an individual cab?

A. Yes, I was. Not an individual cab necessarily, but an individual trip.

Q. Do you remember what trip that was?

A. That was a trip that was supposed to have been picked up at the Players Club and went to the Alibi or that vicinity.

Q. This is Government's Identification 13. First, could [218] you tell us the slip that is in that envelope, is it a part of your business records?

A. It is. It appears to be the same, yes.

Q. Do you, have you placed any mark on that?

A. I signed the back and dated it February 25th.

Q. Is that the date that you signed it?

A. As far as I know it is, yes. It is my writing and I dated it.

Q. I mean you dated it the same day that you signed it? A. Yes, that's right.

Q. Is that the date that you made the search through your records? A. Yes.

Q. And is that a record that was kept in the normal course of your business?

A. That's right.

(Testimony of Victor Hart.)

Q. Does that pertain to any particular cab?

A. Yes, the cab number is designated on the upper left-hand corner of the ticket.

Q. Without telling us what the precise notation on there is, could you tell us what the other notations indicate?

A. The other notations on the ticket. There is a time there and a destination.

Q. And when you were with Mr. Goodfellow making the search of your records, did you search pertaining to any [219] particular day?

A. Yes, we had a specific date that we were looking for.

Q. Do you recall the date at this time?

A. No, I don't.

Q. Was Mr. Jennings in your employ in January of 1955? A. Yes, he was.

Q. Mr. Goodfellow make a notation on the ticket also at the time he found it?

A. Yes, he, looks like it is dated beneath it and he did it, I guess the same time.

Mr. Stevens: Thank you very much. Your witness, Mr. Miller.

Mr. Miller: We have no questions.

The Clerk: I guess that is all.

The Court: Just one question, please, Mr. Hart. Does this identification relate to a certain trip made by your cab 20 from the Players Club to the Alibi Club on a certain date?

Mr. Hart: It doesn't necessarily specify the

(Testimony of Victor Hart.)

Players Club, your Honor, the Twenty-third and Cushman is the destination.

The Court: Is the date shown on that Identification, the date of the trip?

Mr. Hart: No, sir, but the tickets are kept in a file with each date, for instance, on the first of January [220] something like that, the tickets are all kept together. We can go to them at any date and pick those out. This ticket came from the tickets in the date that we were looking for.

The Court: Very well. Thank you.

(Witness excused.)

JAMES J. MURRAY

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you tell us your name, please?

A. James J. Murray.

Mr. Taylor: What is the name?

Mr. Murray: James Murray.

Q. (By Mr. Stevens): Where do you live, Mr. Murray?

A. 300 Slater Drive, Island Homes.

Q. What is your occupation?

A. Bartender.

Q. Are you acquainted with the establishment known as the Players Club here in Fairbanks?

(Testimony of James J. Murray.)

A. Yes, I am.

Q. Calling your attention to approximately the 22nd of January, do you recall whether or not you were there?

A. Yes, I was there on that night. [221]

Q. What time were you there?

A. Well, I, I am not positive of the time. I was there after I finished a shift. I stopped in with some friends and I imagine it was three to four o'clock in the morning.

Q. Was there anyone there that you knew?

A. Well, there was quite a few people that I am acquainted with casually.

Q. Are you acquainted with a young woman named Pat Cathey?

A. I knew the girl by sight. I didn't know her personally.

Q. Did you see her that evening?

A. I saw her sitting at the bar, yes.

Q. Did you notice who she was sitting with?

A. I did notice that, well, I was very close to where she was sitting and I was, there was two soldiers or air force men sitting next to her.

Q. Would you tell us if you noticed anything out of the ordinary occur at the Players Club that evening?

A. Well, it was, I would say a half an hour, an hour after I, oh, a good hour or over after I arrived at the Club I was with several friends. We were standing by the piano talking when, we were rather crowded there in a corner.

(Testimony of James J. Murray.)

Mr. Miller: Just a moment, if the Court please, I will object to any narrative statement on this. I think the District Attorney can bring these out by direct questions.

The Court: Well, he asked him if he saw anything [222] unusual take place that night. I suppose technically the answer would be yes or not, but he may proceed.

Q. (By Mr. Stevens): What occurred following that that you just described?

A. Well, the, like I say, there was quite a bit of noise at the time and I was with a crowd of people. We were standing near the piano. Our view of the entire bar was obscured. There was a disturbance, the door flew open, there was a scuffle at the bar and, well, everybody was craning their necks to see what was happening and this young lady, Pat, was taken from the club by a man and I don't know. I don't like I say, I didn't get too good a look at the person from the position I was in.

Q. Did you see how she was taken from the club?

A. Well, she was taken through the door and that is all I know. She was on the floor and she was being assisted or pulled toward the door.

Q. What was the lighting condition in there at that time?

A. Well, it is never brightly lighted in there and like I say, between the crowd and the smoke it wasn't too good.

(Testimony of James J. Murray.)

Q. Do you know George Haretos?

A. Yes.

Q. Was he there? A. Yes.

Q. Did you see how the young lady got to the floor? [223]

A. No, I didn't see that happen. Like I say, I was standing in the corner with George Haretos and Peterson and we were all standing there grouped around listening to Buz play the piano and there was quite a few people on that end of the bar and I do know that I heard the commotion. When I turned around I was either behind, right behind Pete or George Haretos and I saw the young lady on the floor and as I say I don't know whether she was pushed or fell or what.

Q. Was there anyone with her when you looked at her?

A. There was a man with her. You mean when she was on the floor?

Q. Yes.

A. Well, there was a man bending over her or near her at that time, yes.

Q. Did you see what Mr. Haretos did at that time?

A. Well, Mr. Haretos made as if to, as if he were going to attempt to stop or intervene, but he was delayed just for a moment, he paused and by that time the commotion was over and the people had left and the place resumed its normal business.

Q. Would you tell us how many, about how many

(Testimony of James J. Murray.)

seats are there around the bar or were there at that time? A. How many people were seated?

Q. No, how many places to be seated?

A. I just have to guess. As nearly as I know, I would say fifteen, sixteen. [224]

Q. How many people were at the bar or in the bar at that time?

A. I would guess if I remember correctly, or, it is a little late now, but I would say twenty, twenty-five, between twenty and twenty-five people.

Mr. Stevens: Thank you very much. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Miller:

Q. Mr. Murray, what time did you say you arrived at the Players Club?

A. Well, as I said, the time is vague but it was anywhere between two and four, possibly a little later in the morning. I am not certain of that time.

Q. Did you go there with Mr. Haretos?

A. No, I met Mr. Haretos in the place.

Q. Upon arrival there, did you and Mr. Haretos get together right away or were you there quite awhile before the two of you——

A. As nearly as I remember, I believe we got together very shortly after I arrived because I was alone and I began to speak to George. He is a friend of mine and we had a drink together and walked over to the other side of the bar.

(Testimony of James J. Murray.)

Q. Now, you say this tussle that you saw, you saw this woman on the floor, was that at the [225] bar?

A. Was I at the bar?

Q. Was this, when the woman was on the floor, was that up at the bar?

A. The woman was sitting at the bar, yes, and the tussle occurred on the floor by the bar.

Q. Right by the bar? A. Yes.

Q. And that is when Mr. Haretos attempted to intervene?

A. I am not certain yet whether he was trying to intervene or just trying to get there out of curiosity, but he made an attempt to get there and as I say, the position we were standing in at the bar was rather crowded. It is narrow there. There is a pin-ball machine and the stools take up quite a bit of space and everyone was craving to see what the disturbance was. George was delayed long enough. He was ahead of me. He didn't get to the middle of the floor until the persons had left the bar and then he went outside and there was no one there.

Q. The parties got up and left, the woman got up off the floor, is that correct?

A. No. Well, the woman and the man, whoever he was, left the bar at that time.

Q. Did you see anyone assist her to her feet?

A. No, I didn't.

Q. You state that you had worked a shift prior to going out there? [226]

A. Yes, I was trying to think of where I worked.

(Testimony of James J. Murray.)

I have been working occasional shifts since I came back from vacation Christmas and I am not certain which place I worked that night.

Q. But you do recall definitely that you had worked a shift, is that correct? A. Yes.

Q. And you recall if you had had very much to drink?

A. I had had quite a few drinks when I got off the shift, yes.

Q. But as you recall now, your memory was sound; you can recall what happened very well?

A. Well, as I explained, I have told exactly what I saw that night and I had been drinking. The place is, as Mr. Stevens when he asked how it was lighted, it is poorly or dimly lighted and there was quite a lot of noise at the time. The piano was going and matter of fact, I think we were probably singing to add to the general confusion and so that is all I recall of that.

Q. And the lady was on the floor the first time you saw any of the incident, is that correct?

A. As soon as I heard a noise turned around, the lady was on the floor.

Q. And I believe you testified under Mr. Stevens' questions that she was sitting at the bar with a couple of soldiers, is [227] that right?

A. She was sitting next to either two soldiers or two airmen, I just happened to notice as we started around the bar.

Q. A couple of service men? A. Yes.

(Testimony of James J. Murray.)

Mr. Miller: That's all. Thank you.

Mr. Stevens: Just a minute, Mr. Murray.

Redirect Examination

By Mr. Stevens:

Q. Was that as you went over to the piano?

A. Yes, as George and I went to the piano. As a matter of fact, when I first came in I happened to notice it because this one, I am fairly certain they were Air Force men, I vaguely remember the uniforms were blue and they seemed to be paying quite a lot of attention to her and as a matter of fact a little noisy and you couldn't help but your attention would be drawn to them, naturally, and as George and I started around to talk to Buz, the piano player, I did notice she was sitting with those two fellows.

Q. How long was your back turned to that scene, very long? A. To the——

Q. To the people at the bar, you say your back was turned when you were at the piano? [228]

A. Oh, yes, we weren't paying any attention to any of the customers. We were with our own group standing there talking to Buz and singing.

Q. Then you don't know whether any people came in and joined her at the bar?

A. No, after I first noticed her sitting at the bar with the two GI's I didn't notice her any further.

(Testimony of James J. Murray.)

Q. And Mr. Miller asked you if anyone assisted her to her feet? A. No, I didn't.

Q. How did she get out of the bar?

A. As nearly as I know she did get on her feet and she was either assisted or taken out of the door.

Mr. Stevens: Thank you very much; your witness, Mr. Miller.

Recross-Examination

By Mr. Miller:

Q. Did she appear drunk to you, sir?

A. I, she had obviously been drinking. I couldn't say whether she was drunk or not.

Q. You didn't pay much attention to her then during your stay there?

A. No, I just knew the young lady very vaguely, I mean I knew her by the name of Pat and I had seen her on quite a few occasions and, but I didn't know her personally and I [229] noticed she was drinking and she was sitting with these, or near these Air Force men, one of the Air Force men was a little bit noisy and she seemed to, or he was paying quite a lot of attention to her and I don't think she cared to be annoyed too much by the man and that is how I happened to notice that little incident when I first went in.

Q. You say you had seen her on various occasions, was that at different jobs you were working?

A. No. because I don't believe she frequented

(Testimony of James J. Murray.)

any places I had worked, but I saw her on occasions, oh, at, for instance, the Mecca Bar and the Players on different occasions, so I did know who the young lady was, you see.

Q. Did you ever see her having any trouble prior to this time? A. No.

Q. Did you ever see her in quarrels or possibly in fights? A. No.

Q. Have you seen her drunk on occasions?

A. Well, as I say, it is hard to define drunk. Of course, being a bartender we have a lot of people that drink, hold their liquor well and some that show it more than others, but on occasions I have seen her drinking. I would say that.

Q. Would you consider a customer drunk if they fell off the stool? [230]

Mr. Stevens: I object to that. There is no evidence here that this young lady fell off the stool.

The Court: Sustained.

Mr. Miller: That's all.

Mr. Stevens: Thank you.

(Witness excused.)

Mr. Stevens: May we have the recess at this time, your Honor.

The Court: It is just about eleven o'clock, so members of the jury, again I admonish you not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the sub-

ject of the trial; and do not form or express any opinion until the case is finally submitttd to you. The Court will recess for ten minutes.

The Clerk: Court is at recess for ten minutes.

(Thereupon, at 11:00 a.m., the Court took a recess until 11:10 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened.

The Court: Let the record once more show the presence of the defendant, counsel. Parties wish to have the jury polled.

Mr. Taylor: No, we will stipulate they are all present, your Honor. [231]

Mr. Stevens: We will so stipulate.

The Court: Very well.

Mr. Stevens: Call Mr. Frank Meyers.

FRANK MEYERS

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. State your name, please?

A. Frank Meyers.

Q. If you will hold that about two inches from your mouth, Mr. Meyers, it will work just right. Now, where do you live, please?

A. Twenty-sixth and Cushman.

Q. Would you try to speak slowly for us, please,

(Testimony of Frank Meyers.)

Mr. Meyers, so we can understand you. Why don't you try it without the mike, try talking real loud.

A. Well, I have such a cold.

Q. Oh, I'm sorry. You will have to use it then, please. What is your work, Mr. Meyers?

A. Iceman.

Q. Do you know Mr. Urban? A. Yes.

Q. And do you know what his business is?

A. Yes. [232]

Q. Where is it located?

A. Twenty-third and Cushman.

Q. And what is the name of that business?

A. Alibi Club.

Q. Now, did you know Myrtle Cathey?

A. Yes.

Q. Did you ever go to the club when you weren't on business? A. Yes.

Q. When is the last time that you went there that you remember?

A. Oh, shortly after New Years.

Q. Of this year, 1955? A. Yes.

Q. Who was there at that time?

A. Mr. Urban and Myrtle.

Q. What time was that?

A. Oh, about nine o'clock.

Q. In the evening or in the morning?

A. Evening.

Q. Was there anyone else there at that time?

A. One other man.

Q. What did you do there?

(Testimony of Frank Meyers.)

A. I sat at the bar and bought a drink.

Q. Where was Myrtle Cathey? [233]

A. She was at the bar.

Q. Where was Mr. Urban at that time?

A. Well, at that time he was out somewheres.

I don't know where.

Q. Did he come into the bar at all?

A. Yes.

Q. Where were you when he came in?

A. Sitting at the bar with Myrtle.

Q. Did you see what Mr. Urban did when he came in?

A. He sat down aside of Myrtle at the bar.

Mr. Taylor: Just a moment. I am going to object, your Honor, until a time is laid for these occurrences. I don't think this witness has testified to any time.

The Court: The time is shortly after New Years, as the Court understands it.

Mr. Taylor: Well, your Honor, we object to any testimony as to shortly after New Years as it would certainly not be material or relevant to the matters at issue here unless it was on January the 22nd. I think any occurrence.

The Court: There is no doubt it is difficult to determine the relevancy at this time. Does the government wish to approach the bench.

Mr. Stevens: Yes, your Honor.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the [234] jury):

(Testimony of Frank Meyers.)

Mr. Stevens: I don't want you to weigh the law by the size of the books, your Honor. This offer of proof is proof of a former assault upon the deceased by the accused shortly before the assault alleged in the indictment, and we believe that such matters are admissible not only to show his intent but also to show, but also would be relevant to establish the cause of death in this case. We have some specific citations for the Court.

The Court: That is bearing on intent and cause of death, is that right?

Mr. Stevens: Yes, sir.

Mr. Taylor: If the Court please, we certainly don't think, we take issue with that statement because we can see no relevancy as to something that happened at an indefinite date after New Years, that is not connected with the case at issue. I don't see, it would just be prejudicial. It wouldn't show any intent in case there was an assault, would it show intent of committing a murder at a future date? It would seem to me it would be highly prejudicial, your Honor, and I can't see where there would be anything to go to prove any of the material issues of this indictment.

The Court: Well, it is a highly important question that hasn't been contemplated by the [235] Court.

Mr. Stevens: I would be pleased to give these——

The Court: It is so important that I don't wish

(Testimony of Frank Meyers.)

to rule on it at this time and I am just debating because of the hour. It is, it is now 11:15. I am just debating whether I will let the jury go until two o'clock and look into this. Mr. Stevens, at this time maybe it isn't fair to ask you, but do you have in mind bringing in other witnesses other than the gentleman on the stand to testify as to specific acts of cruelty on the part of the defendant not involving the victim?

Mr. Stevens: No, your Honor, we believe that would be a matter of rebuttal only. The only proof that we would offer on direct examination is proof of prior assaults upon the deceased because we believe the cases are unanimous in that, but as to third persons we have no intention to offer such evidence.

The Court: As I say, I think this is important enough that I want to take some time with it. I want to be as certain as I can be that I am right.

Mr. Stevens: We have two other matters, your Honor, which should properly be the subject of an offer of proof in this connection if the Court wishes to take time to consider this perhaps it would be wise to consider all three.

The Court: Yes. [236]

Mr. Stevens: The government would offer to show that shortly after this assault on the 22nd, some time during the week beginning the following Monday, Mr. Urban delivered to the New Method Cleaners a series of wearing apparel including Miss

(Testimony of Frank Meyers.)

Cathey's clothing that she had on the evening of the 22nd and we would offer to show by the cleaners that blood stains were removed from her clothing at that time. We also have a third offer of proof concerning the pictures which have been identified by Mr. Douthit, through the Territorial Police Officers who were present at the time Mr. Urban was arrested on the 26th of February, at which time in an examination of the room in which Miss Cathey was attended by the Doctor on two occasions blood stains were found on two walls and in the drawer of one dresser and also that the window of the door to that room was freshly painted. We believe that those two items are relevant even though the time is remote because we had no access to that room prior to that date.

The Court: How was access obtained on that date at the time pictures were taken?

Mr. Stevens: We had a warrant for his arrest and he was arrested in the club.

The Court: Was that the date of the arrest?

Mr. Stevens: Yes, sir.

The Court: In other words, incident to the arrest you contend? [237]

Mr. Stevens: Incident to the arrest they obtained the pictures, and we have the samples of blood. We have also a right under the Territorial statutes to search a building. The question of seizure would be another matter.

Mr. Taylor: We don't go along with that, your

(Testimony of Frank Meyers.)

Honor. If he is arrested away from the place it must take a search warrant to arrest his place of residence.

The Court: He was arrested in the place?

Mr. Taylor: No, in the building. He was sitting at the bar stool.

Mr. Stevens: The Statute of Alaska is specific, myself, the Marshals, the Territorial Police have the right at all times, a business selling liquor is open to inspect that building and any room which you can enter from the bar without going outside and that was the situation in this case. We inspected the whole building.

Mr. Taylor: This was no violation of the liquor law, your Honor. That is only the liquor law.

The Court: Gentlemen, you all agree these are some important questions and the Court wishes to take a little time with them and I, unless you have some valid objection I will excuse the jury to report at two o'clock.

Mr. Stevens: Very well. We think that the Court should take time. [238]

The Court: I want your authorities, Mr. Stevens.

Mr. Stevens: We have authorities for this proposition and also for the bloodstains, your Honor.

Mr. Taylor: If the Court please, we are going to object to any pictures because the door, the freshly painted door they claim, is still there. It can be brought in here and I think it would be better to have that and the picture because the door was

(Testimony of Frank Meyers.)

painted a year ago and the paint has never dried on it, the paint is just as wet now as it was when it was put on.

Mr. Stevens: I believe that would be a matter of the defense to go to the weight of the evidence.

Mr. Miller: We don't have to prove anything.

The Court: Is there anything further you want for the record before I excuse the jury until two o'clock.

Mr. Miller: Except that we are going to object to these proofs that he has to offer.

The Court: Oh, yes, I understand that.

Mr. Stevens: Perhaps I could read you these citations after the jury is excused.

The Court: Very well.

Mr. Miller: Another thing, if the Court please, we ask, too, that we be permitted an opportunity to do some research on this ourselves.

The Court: Yes, but I will need the authorities, of [239] course, before two o'clock.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:)

The Court: Members of the jury, some matters have come up that do not concern you at the present at least, and it being now 11:25, the Court is going to excuse you until two o'clock, but again I admonish you that it is your duty not to discuss the subject of this trial with any person; do not permit any

person to discuss it with you; do not listen to any conversation concerning the subject of the trial; and do not form or express any opinion until the case is finally submitted to you. And you are excused until two o'clock.

(Thereupon, the jury withdrew and the following proceedings were had out of the presence and hearing of the jury:)

Mr. Taylor: If the Court please, I think possibly in view of the fact that we would desire to submit some authorities, that the reading of these cases could go over until after we convene this afternoon. We have no rebuttal at the present time.

The Court: The Court, of course, would like to make use of the time between now and two o'clock. Otherwise, I would be obliged to send the jury out again and I want to rule on these matters at two o'clock so, therefore, I want [240] citations from both the government and the defense as soon as possible.

Mr. Taylor: Well, if we stay here while those are read, your Honor, it shortens our time to look up the case. If Mr. Stevens gives the citations and let us go on about our business.

The Court: This is not an argument. It is merely giving citations and I presume you want to take them down, too. So I would like to have the citations of both the government and the defense, if any you have.

Mr. Stevens: In regard to the previous assault,

your Honor, we would cite the case of *People v. Palassou*, at 111 Pacific Reporter, Page 109. That is the first volume, 111 Pacific Reporter. We would also cite the case of *State v. Ties*, 17 Pacific 2nd, Page 798. That is an Oregon case, your Honor.

The Court: It is on the same point?

Mr. Stevens: Yes, your Honor, it is on the same point, the specific beating in that case was brought about at the instance of the defendant rather than by the defendant, but the Court discusses the past actions of the accused.

The Court: Very well.

Mr. Taylor: Would you give us that volume and page number?

Mr. Stevens: 17 Pacific 2nd at Page 798.

The Court: Very well. [241]

Mr. Stevens: In the case of *Kelly v. United States*, 177 Federal 2nd, at Page 280, this is a Ninth Circuit case and we would point out to the Court that the evidence was elicited by the government on cross-examination of the accused in that case. As to the matter of the blood stains, we have two separate offers of proof in that, your Honor.

We believe that they should be considered separately.

The first pertains to the evidence of the blood stains in the clothing of Myrtle Cathey and we admit that there is only a very slight trace of those stains at this time. We have the testimony of the cleaners who removed the stains. It is the relevancy of blood stains in general. We cite the Court the case of

Wilson v. United States, the Supreme Court case, Volume 162, United States Reports, and specifically the discussion appears on Page 620, your Honor, and thereafter. On the same point, blood stains generally, the case of State v. Shawley, 47 Southwestern Reporter, the Second Series at Page 74.

The Court: Very well.

Mr. Stevens: And the specific discussion, it is quite a long case, pertains to demonstrative evidence of blood stains on Page 84 of that volume. The case of State v. Martin found in 25, I believe it is, Volume 25, of the Southwestern Reporter, the original series, it is a decision of the Supreme Court of the State of Virginia at Page 113. [242] It is State v. Martin, your Honor, pertains to, on Page 116 blood stains on the floor in the vicinity of where the deceased was found. Also have the case of People v. Johnson and that pertains to the existence of blood stains in the clothing of the deceased as well as the clothing of the accused, as I recall it, particularly the clothing of the accused. That is 35 Northeastern Reporter at Page 604. That is a case in the highest Court of the State of New York, Court of Appeals. We have one other that I failed to bring in, it is a case involving a decision of the District of Columbia Court of Appeals. I will furnish it to the Court and counsel. I am sorry, I do not have it here.

The Court: You have something on the photos, pictures?

Mr. Stevens: We had a long list of cases in regard to photographs in general, but none in regard

to the photographs of these blood stains, your Honor. I believe that the case that I have in mind, though, the District of Columbia in that case there were photographs taken of the blood stains under a park bench and were admissible. I will get that case, your Honor. That is the only case I know of on that point.

The Court: I want to have this matter decided by two o'clock, but if counsel feel it might be advisable I would like to have the authorities submitted as soon as possible and we might have a discussion at 1:30, but perhaps that won't be [243] necessary if counsel can get the authorities to me and, of course, I will look at authorities other than those cited.

Mr. Stevens: We do have another line of testimony we could go into for the balance of the day if the Court wishes to take the full day on the matter. We could go into this other line and resume the line of testimony offered here beginning with Mr. Meyers tomorrow morning.

The Court: Would it at all prejudice the government's case to proceed with the other line of proof? It is certainly important that it be properly decided.

Mr. Stevens: Well, I will put it this way, should the Court be unable to decide these points by two o'clock, we would then consider whether we could go into that, but we wouldn't want to decide it at this time.

The Court: Very well. If there is nothing fur-

ther the Court will recess until two o'clock.

The Clerk: Court is recessed until two o'clock.

(Thereupon, at 11:40 a.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel, and the government attorneys. [244]

The Court has decided to admit testimony that on an occasion during the month of January, 1955, and prior to the 22nd day of January, 1955, the defendant assaulted Myrtle Cathey. And I cite Section 363 of the Wigmore on Evidence and Section 353 of Wharton's Criminal Evidence. Both state that such evidence is admissible. Also, the cases of *State v. Rediger*, a Minnesota case found in 8 Northwestern 2nd, Page 627 and *State v. Justice*, an Oregon case, 71 Pacific 2nd, 799 which expressly hold that such testimony is admissible and in ruling I am not unmindful of the citations given to me by the defendant, *Keefer v. State* found in 154 Northwestern, Page 870.

The Court has not fully determined the other matters presented in the offer.

Mr. Taylor: If the Court please, would the

Court under appropriate instruction in this case show that the purpose of that is only for the purpose to prove intent. I believe the cases hold that, and that the details of it cannot be gone into. Wharton on Evidence.

The Court: Well, the Minnesota case says that such evidence is admissible to show a course of conduct and a mental attitude of the defendant toward in this case his wife, and to show malice, but I think the government has asked that such evidence be admitted as bearing on intent and cause of death. [245]

Mr. Stevens: There was one case that we cited, your Honor, which stated that the evidence of prior acts is limited to the same person of the deceased, would be relevant to show cause of death, but I believe that an instruction showing that the evidence is admitted for the purpose of demonstrating the state of mind of the defendant would necessarily include intent and malice as I interpret it, it would be sufficient for the government and would assure us that there would be no——

The Court: For the purpose of demonstrating a state of mind of the defendant?

Mr. Stevens: I believe that is correct, your Honor. Both, as I understand it, both malice and intent are a state of mind.

Mr. Miller: If the Court please, strictly not intent at all. Strictly on malice. I believe those cases show it would not include intent in any way. It would be malice and a state of mind, strictly.

The Court: The Court then will admit the evidence only as demonstrating the state of mind of the defendant.

Mr. Taylor: On that date? Right.

The Court: I don't know whether it should be limited to that particular date. The defense counsel suggests that it be limited to show the state of mind of the defendant on the date of the alleged assault to be produced by this witness. [246]

Mr. Taylor: Yes, that this witness is about to——

The Court: What does the government think of that?

Mr. Stevens: Well, I believe that Mr. Taylor implies that it should show the state of mind only at the time Mr. Meyers is going to testify concerning about. If that were so, the evidence would not be relevant anyway. Other than relevant in it shows a continued state of mind and implies a state of mind at the time the act for which Mr. Urban is being tried was committed, and we believe that any limitation as to date would be improper.

Mr. Miller: If the Court please, in reference to this particular matter, the state of mind continuing over would definitely have to be established by a certain particular foundation. It could not be a continuing matter unless it is shown to be such. In other words, if these two people were very happily and harmoniously together between that time, the intent to commit a malicious act certainly could not

be implied from a previous date and we would definitely object to that.

The Court: The Court feels that such an objection should be overruled. I think that in this trial that we are concerned with the state of mind of the defendant and the pertinent dates in the Indictment.

Mr. Miller: Then does the Court contend that that is prior to and after the state of mind, prior to the dates in [247] the indictment and after the dates in the indictment also?

The Court: Well, I don't know whether his state of mind after the alleged crime has been committed would be material. I don't know at this time whether it will be necessary for me to instruct the jury as to the exact time of the state of mind, but merely inform the jury that such evidence will be received. Of course, that is dangerous, too, because we don't know what the witness is going to testify as yet.

Mr. Taylor: No, your Honor, we would object to any instructions given at this time. Instructions should be given at the conclusion of all the testimony.

The Court: On that theory then, the jury may be called in and the government may proceed with the witness.

Mr. Stevens: I have one more question, your Honor, concerning the other line of testimony. We have the witnesses for the government on the other line of testimony waiting in the hall and if the Court intends to reserve a decision on that matter,

I would like to get other witnesses ready to proceed.

The Court: Could you do that, Mr. Stevens?

Mr. Stevens: Yes, we could.

The Court: That would be well. It would give me more time. The other line you refer to blood stains.

Mr. Stevens: We have for the Court and counsel's information the testimony concerning the blood stains on the [248] clothing. These people are waiting outside.

The Court: I think you can proceed with those witnesses also.

Mr. Stevens: And we have the testimony of the officers pertaining to the blood stains located in the building of the Alibi Club, those people are also waiting.

The Court: You could hold up on the photos until tomorrow.

Mr. Stevens: That is the second that I mentioned, they are shown by the photos and we also have the evidence we obtained from the walls themselves.

The Court: Yes, but you could proceed without prejudicing the government's case by——

Mr. Stevens: We could, your Honor.

The Court: Very well.

Mr. Taylor: If the Court please, we are going to strenuously object to any testimony about blood stains in the building if they were first found on the 26th day of February, and if the Court would allow that we would still strenuously object unless it was

shown that the blood stains were of the type of either the deceased or the defendant and that they were there on the, or on the 30th, or the 31st day of January, 1955.

The Court: Very well. You may proceed.

(Thereupon, the jury entered the courtroom and the [249] following proceedings were had in the presence and hearing of the jury:)

Mr. Stevens: Call Mr. Meyers.

The Court: The parties wish to have the jury polled?

Mr. Stevens: We will stipulate that the jury and the alternates are all here, your Honor.

Mr. Taylor: The defense will stipulate.

The Court: Very well.

FRANK MEYERS

the witness under examination at the time the recess was taken, resumed the stand for further

Direct Examination

By Mr. Stevens:

Q. Now, Mr. Myers, if you will recall that occasion, what happened, if anything, after that?

A. Well, they got in an argument and he back-handed her one.

Q. And what happened at that time?

A. Well, then she fell off the stool. In a minute or two she got up and sat on the other side of him.

(Testimony of Frank Meyers.)

Q. How long were you there at that time?

A. About fifteen minutes, thirty minutes.

Q. Did you hear the argument?

A. No, paid no attention to it.

Q. Did you observe where Miss Cathey fell?

A. Well, she fell back behind me and she must have hit [250] her head on the bowling machine.

Q. Now, did you have any business connection with the Alibi Club? A. I take ice in there.

Q. How often did you deliver ice during January, 1955? A. About every other day.

Q. Do you recall whether or not you delivered ice to the Alibi Club during the week between the 22nd and the 29th of January? A. Yes.

Q. How often did you deliver ice during that time? A. Every other night.

Q. What time did you go to deliver the ice on those occasions?

A. Oh, around, between five and six.

Q. Is that in the evening or in the morning?

A. Evening.

Q. Who was there if anyone on those occasions?

A. Well, sometimes Mr. Urban was there and then he had a bartender name of Tom. He was there once in awhile.

Q. Did you see Myrtle Cathey? A. No.

Q. Did you know whether or not she was there?

A. Well, she must have been. I heard someone in the other room.

Q. How did you know that? [251]

(Testimony of Frank Meyers.)

A. Cause she was moaning, talking to herself.

Q. When was the last time that you were there during January of 1955, do you recall?

A. No, I can't.

Q. Did you on any of the occasions that you delivered ice between the 22nd and the 29th, talk with Mr. Urban?

A. Well, one time.

Q. Do you recall which time that was?

A. In that, in the meantime between that time.

Q. Was there anyone else there at that time?

A. No.

Q. Was this the approximate time that you stated between five and six in the evening?

A. Yes.

Q. What was the conversation you had with Mr. Urban?

Mr. Taylor: Just a moment, your Honor, I am going to object. The proper foundation has not been laid as to the time.

The Court: The Court is in a difficult position and I wonder how much of the testimony of this witness the jury has heard. I am not sure as to the time and he may have established it well, Mr. Stevens. For the Court's satisfaction would you please establish the time? You may have already done it, but I am not certain.

Q. (By Mr. Stevens): Do you recall which occasions this conversation took [252] place on?

A. You mean——

Q. About when in the month?

A. No, I couldn't.

(Testimony of Frank Meyers.)

Q. Do you remember the month?

A. January.

Q. Did you see Myrtle Cathey there?

A. No.

Q. Do you know whether she was there?

A. Well, I presume she was there cause I heard her.

Mr. Taylor: We object to any assumption, your Honor.

The Court: Strike out the presumption, but let it stand that he heard moaning and groaning.

Q. (By Mr. Stevens): And where was that moaning and groaning or what you heard coming from?

A. From the, from the men's room where they sleep, from the bedroom where they sleep.

Q. And was this occasion during the time that I have already asked you about, during that week?

Mr. Taylor: Just a moment, your Honor. That is a pretty indefinite question I think, going to object to it.

The Court: Perhaps leading, but the Court feels that counsel has sufficiently established the time and place. [253]

Mr. Taylor: We would like to have that week though, established, your Honor.

Q. (By Mr. Stevens): What was the conversation you had with Mr. Urban?

Mr. Taylor: Just a moment, we are going to object until and the time and place is laid, your Honor, proper foundation laid.

(Testimony of Frank Meyers.)

The Court: Overruled. He may answer.

Mr. Meyers: Well, between five and six.

Q. (By Mr. Stevens): Do you remember the conversation, Mr. Meyers, with Mr. Urban?

A. I asked him where is Myrtle, said she was sick.

Q. Did you ask him anything further?

A. No.

Q. During this time when you delivered ice could you see the approach to the bedroom?

A. Well, yes, see the door.

Q. And was that door open or closed?

A. Closed.

Q. Did you see whether or not there was any fastening on it? A. Once.

Q. Pardon.

A. The way it looked it was. [254]

Q. Pardon? A. The way it looked it was.

Q. What type of fastening was it?

A. A hasp and a lock.

Q. A hasp and a lock? A. Yes.

Q. Did you at that time or during that time ever talk to Myrtle Cathey? A. No.

Mr. Stevens: Your witness, Mr. Taylor.

(Testimony of Frank Meyers.)

Cross-Examination

By Mr. Taylor:

Q. Mr. Meyers, when did you first notice the hasp on the door going to the bedroom?

A. For a long time.

Q. What? A. For a long time.

Q. For what? A. For a long time.

Q. Oh, for a long time. That has been on there last year?

A. I guess it was on there last year, yes.

Q. Now, this moaning and groaning you say you heard somebody; you didn't know Miss Cathey was in the room, did you?

A. Well, I knew she was there. [255]

Q. How did you know?

A. I hadn't seen her no place else.

Q. What?

A. I didn't see her nowhere else.

Q. You think because you hadn't seen her any place else she was there, is that right?

A. Yes.

Q. Couldn't she have been over to some other night club? A. No, I don't imagine.

Q. Could she have been in the hospital?

A. No.

Q. Did you know she went to the hospital?

A. I knew afterwards.

Q. You knew afterwards. What did she say when she was groaning and moaning?

(Testimony of Frank Meyers.)

A. You didn't understand her.

Q. What?

A. You couldn't understand her.

Q. Did Mr. Urban go in there when she was groaning? A. No, he was at the bar.

Q. What? A. He was at the bar.

Q. What was your condition as to sobriety at the time you was there? A. Cold sober. [256]

Q. You sober that night? A. Yes, sir.

Q. And you sure of that? A. Absolutely.

Q. You had any drinks at all?

A. Oh, had a few.

Q. Had a few, so then because you heard somebody in the other room you assumed that was Myrtle Cathey; is that right? A. That's right.

Mr. Taylor: That's all.

Mr. Stevens: Thank you, Mr. Meyers.

(Witness excused.)

WILLIAM JOHNSON

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. William Johnson.

Q. What do you do, Mr. Johnson?

A. Well, at the present time I am working construction, truck driver.

(Testimony of William Johnson.)

Q. And for whom did you work during January of 1955?

A. Don McVeigh, New Method Cleaners.

Q. The what? [257] A. Don McVeigh.

Q. And where was that?

A. New Method Cleaners.

Q. And where do you reside?

A. 820 Sixth Avenue.

Q. Here in Fairbanks? A. Yes.

Q. What did you do for the New Method Cleaners? A. Drove cleaning truck.

Q. Do you know Mr. Urban? A. Yes.

Q. In connection with your business as a driver for New Method Cleaners, did you ever have contact with Mr. Urban? A. Yes.

Q. And at that time did you know where his place of business was? A. Yes.

Q. Where was it, please?

A. Oh, approximately twenty-third and Cushman.

Q. What is the name of it?

A. Alibi Club.

Q. Did you know whether any other person was connected with that business out there?

A. No.

Q. Did you ever meet a Pat, Pat Cathey out there? [258]

A. Yes, I have seen her there.

Q. Could you tell us whether or not as a driver for New Method Cleaners, you had occasion to go

(Testimony of William Johnson.)

to the Alibi Club after the 22nd day of January, of this year?

A. Well, I am not sure of the exact date.

Q. Do you know approximately when it was?

A. Just about that time. I don't know the exact date. I don't remember, but it is about that time, yes.

Q. Do you remember the time of week?

A. I believe it was on a, either a Wednesday or Thursday, about the middle of the week.

Q. And for what purpose did you go there?

A. To pick up some dry cleaning.

Q. And did you pick up some dry cleaning?

A. Yes.

Q. Do you remember what you picked up?

A. I don't remember all the articles, no. There were several pieces of clothing.

Q. What did you do with them the items that you picked up?

A. I took them to the cleaning plant.

Q. And where was that located?

A. On Wendell Avenue.

Q. Pardon?

A. In the three hundred block on Wendell Avenue.

Q. Did you notice whether the items you picked up were [259] items of women's apparel or men's clothing?

Mr. Taylor: We object to the leading question, your Honor.

The Court: He may answer.

(Testimony of William Johnson.)

Mr. Johnson: I believe there was some of each.

Q. (By Mr. Stevens): Do you recall any of the specific items in either of the types?

A. Yes, I believe so.

Q. What do you recall at this time?

A. Well, there was a, one woman's parka, parka I think it was, or a short coat or something like that.

Q. Did you notice anything in connection with that coat, the condition of it?

Mr. Taylor: Just a moment, your Honor, we are going to object to the testimony, any condition, I think the clothes are the best evidence, your Honor.

The Court: He may state what he saw if he noticed the condition.

The Clerk: Government's Identification No. 14.

(Ladies' red parka was marked Government's Identification No. 14.)

Mr. Johnson: Do I answer the question?

Q. (By Mr. Stevens): Yes, please, Mr. [260] Johnson.

A. Well, I noticed when I picked it up, I have to pick the articles up and bundle them up, I noticed the parka had some blood on it.

Mr. Taylor: Well, going to strike that, ask that the answer be stricken on the ground that it would be a conclusion of the witness as to whether or not it was blood.

The Court: Overruled.

The Clerk: Government's Identification No. 15.

(Testimony of William Johnson.)

(Dark gray slacks were marked Government's Identification No. 15.)

Q. (By Mr. Stevens): What did you do with the items when you got to the New Method Cleaners?

A. I took them inside and laid them on the floor next to the checking machine.

Q. Do you know who was at that time operating that machine? A. Yes, the girl, Jeannie.

Q. Do you know her last name, please?

A. No, I don't.

Q. Did you have any further connection with those items that you took in?

A. No, that is all I have to do with them, just take them in.

Q. I mean after they were cleaned did you have any [261] connection with them? A. Yes.

Q. What did you do with them at that time?

A. Took them back to the same place I brought them from.

Q. And was anyone there at that time?

A. Yes.

Q. Who was there? A. Mr. Urban.

Q. And was that at the Alibi Club?

A. Yes.

Q. How long was it after you had picked them up, do you recall?

A. I don't recall the exact amount of days, no.

Q. Was it within the same week?

A. I don't remember. To the best of my knowledge it would have been three or four days. That is

(Testimony of William Johnson.)

the usual procedure unless someone ask for clothes earlier.

Q. Do you recall the time of day that you went there?

A. You mean to pick them up or take them back?

Q. Take them back?

A. It was about, I believe around six o'clock at night or perhaps closer to seven o'clock.

Q. And you stated you saw Mr. Urban there at that time? A. Yes, he was there.

Q. Did you see Miss Cathey at that time?

A. No. [262]

Q. Did you have any conversation with Miss Cathey at that time, I mean with Mr. Urban at that time? A. No.

Q. This is when you took the things back in?

A. Yes.

Q. Did you have any other type of job during that period of time, Mr. Johnson? A. Yes.

Q. What was that, sir? A. Drove a cab.

Q. What type of cab did you drive, for whom?

A. Pioneer-Radio Cab Company.

Q. And as a cab driver, did you ever have any contact with Miss Cathey?

A. Oh, I had hauled her as a passenger in the cab, yes.

Q. Did you, do you remember the last time that you hauled her as a passenger?

A. No, I don't.

Q. On the evening that you took the clothes back,

(Testimony of William Johnson.)

do you know or did you know at that time where Miss Cathey was? A. No.

The Clerk: Government's Identifications 16 and 17.

(Dark sweater was marked Government's Identification No. 16; gray slacks were marked Government's Identification No. 17.) [263]

Q. (By Mr. Stevens): Mr. Johnson, these are Government's Identification 14 through 17; would you come down and take a look at these for us, please? Would you look them over and see if you can recall whether or not you have seen those before?

A. Well, I can look at them, but I can't tell you, I can't identify them, swear that I seen those particular clothes.

Q. Are you familiar with the type of markings placed in the clothing by the New Method Cleaners?

A. Oh, to a certain extent, although that wasn't part of my job. Sometimes I would help them get them in a hurry. I think I know. It is a little small tag inside the clothes.

Q. You don't have any independent recollection of those clothes?

A. Not piece by piece, no. I couldn't swear they are exactly the same clothes, no.

Mr. Stevens: I see. Would you take the stand again, please? Your witness, Mr. Taylor.

(Testimony of William Johnson.)

Cross-Examination

By Mr. Taylor:

Q. Mr. Johnson, you stated that you saw blood stains on one garment, was that on the red garment?

A. I don't know if that was the same garment or not. The garment I took from there, yes. [264]

Q. What color was that stain? What color was the stain, Mr. Johnson?

A. It was a dark stain like blood is, all I know.

Q. Red, was it red?

A. Brownish, reddish color.

Q. Blood after it oxidizes isn't it dark brown?

A. I don't know the exact color of it, I can't answer that.

Q. I take it then you just assumed it was a blood stain, that right, Mr. Johnson?

A. That's all.

Q. You had no analysis made whether it was blood or strawberry jam, did you? A. No.

Q. Could have been either, could it not?

A. I suppose it could have.

Q. You don't know whether this was the same parky or not, is that right? A. That's right.

Mr. Taylor: That's all.

Mr. Stevens: Thank you, Mr. Johnson.

(Witness excused.)

Mr. Stevens: Call Mrs. Metcalf.

The Clerk: Government's Identification No. 18.

(Laundry record book was marked Governments' Identification No. 18.) [265]

JANE METCALF

a witness called in behalf of the plaintiff, was duly sworn, and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you tell us your name, please?

A. Jane Metcalf.

Q. How do you spell the last name, Mrs. Metcalf?

A. M-e-t-c-a-l-f.

Q. And where do you live, Mrs. Metcalf?

A. At 218 Third Street, Hamilton Acres.

Q. And did you work during the month of January of this year?

A. Yes, I did.

Q. And who were you working for?

A. For Don McVeigh.

Q. And where was that, what place of business?

A. The New Method Cleaners.

Q. And what were your duties?

A. I checked the clothes in that come in and checked them out.

Q. Did you keep a record of the clothes as you checked them in?

A. Yes, I did.

Q. Is there any way or did you use any way to mark the clothes as they came in? [266]

A. Yes, I put a number in them .

Q. And how was that number placed on the clothes?

(Testimony of Jane Metcalf.)

A. Placed on the bottom of each garment.

Q. By what means did you fix it to the garment? A. With a staple.

Q. This is Government's Identification 18, Mrs. Metcalf, do you know what that is?

A. That is the, my record book.

Q. And by looking at it, do you know what month it was for? A. January.

Q. It is, did you keep this record?

A. Yes, I did.

Q. Would you take it, please? By looking, is that a record that was kept by you as part of your duties at the New Method Cleaners?

A. Yes, it is.

Q. Were you required to keep that record?

A. Yes; I have to do that for all the clothes that come in there.

Q. And would that record show any connection with the actual clothes that came in, by the markings that you have described? A. Yes.

Q. And how would that be shown, how could you show that? [267]

A. Well, the number that would be in the garment or the clothes, it is in the book.

Q. Fine, thank you, Mrs. Metcalf. Would you examine these garments here, the identifications on the desk here, please, and look to see if you can find your marks or any mark on there, than you could distinguish these clothes?

A. This is one of my marks right here in this parka.

(Testimony of Jane Metcalf.)

Q. Are there similar marks on these other pieces of clothing?

A. Yes; here is another one, there is no mark on these.

Q. Would you look at the others, please?

A. This is an old number here.

Q. Can you identify the two numbers that you have found, with that book that you got?

A. Well, I guess you would call this a jacket, a parka here. I don't remember any of the others.

Q. Can you identify the number with the book?

A. Yes, I can.

Q. Would you do that; could you do that?

A. Yes, I could.

Q. Would you take the book, please?

A. It is 18777.

Q. Do you recall checking these items in at all?

A. Well, I recall checking a parka in, but I can't [268] recall the other clothes, checking them in.

Q. And who was the customer that you checked these in for, under what name?

A. Well, it was under Curly Urban's name.

Q. And do you know who brought them in?

A. No, I don't. They were just in a pile and I just check them in.

Q. At the time you recall the parka; do you recall what you did with the parka?

A. Well, I just set it back where I put all the other clothes in a box.

Q. Do you have any recollection at this time

(Testimony of Jane Metcalf.)

of handling this parka? A. Yes, I do.

Q. Do you recall what the condition was at the time you handled it?

A. Yes; it had some blood stain.

Mr. Taylor: Just a moment. Just a moment. We are going to object, your Honor, on the grounds any further conversation regarding this parka for the reason that it is evidently in a, not the condition now as it was when it was taken to the cleaning plant. The clothes should speak for themselves, your Honor, and in their present condition they certainly cannot speak for themselves.

The Court: I understand the government is trying to [269] show the condition that it was in prior to being cleaned and I will permit the witness to answer.

Mr. Taylor: I would like a little, I got a little law on that subject, your Honor, and I certainly like to approach the bench.

The Court: Very well.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Taylor: If the Court please, we are objecting to any further evidence regarding this clothing upon the grounds that the clothing itself would not be admissible in evidence, and in that respect I would like to state that the Wharton on Criminal Law has stated, that it has been repeatedly held that articles of clothing worn at the time of the

(Testimony of Jane Metcalf.)

crime by the deceased or the injured person are admissible in evidence provided they, I will use the word demonstrate or throw light on some issue and provided that they are properly identified and are shown to be in substantially the same condition at the time of the offense. 16 Corpus Juris Secundum, 619, and then Pacific Northwestern, Southwestern and Northwestern Reporters do substantiate the same proposition, your Honor, that these would be inadmissible in evidence and they would be inadmissible to show the condition as there is a substantial change from the time; and another thing, your [270] Honor, there has been nothing to show that these items are items of the deceased, proper foundation has not been laid, your Honor.

The Court: Of course, the garment itself has not been offered in evidence.

Mr. Taylor: Well, if it is not going to be offered in evidence we can't have any testimony about it. It must first be identified as the property of the deceased.

Mr. Stevens: It was picked up from the Alibi Club on the 26th, approximately at that time. The testimony of Mr. Johnson and the testimony of Mrs. Metcalf together would show, but as to testimony to show ownership, I am afraid the only person that could testify as to ownership would either be the defendant or deceased; in that event if the government, if we must show conclusively that she owned these items, I believe we would be estopped from proceeding. We have shown they were picked up from the

(Testimony of Jane Metcalf.)

same place. Evidence shows that Miss Cathey was connected with that place of business; that she lived there; that these were picked up from her place of living. They are women's clothing. She and Mr. Urban only lived there according to the evidence that is in the record so far, and I believe it is a logical inference that they are her clothes and particularly when they had blood on them four days later.

Mr. Taylor: No testimony that they had blood on them. [271]

The Court: It looked like blood.

Mr. Taylor: Another thing, we would have to go against the great established weight of the opinions, your Honor, to let those things in in their present condition. It is easy to state what their condition was, but they come in here clean. Now, he is going to say we have to leave a conclusion up to the jury. We can't do that.

Mr. Stevens: I believe that the cleaner, who is an expert in removing spots, ought to be able to tell us the substance of the stuff he removed.

The Court: This woman is just the check girl.

Mr. Stevens: Just preliminary.

Mr. Taylor: Where a change is made the authorities say you can't get it in. There is no exception in the authorities, your Honor. Whether they are changed on purpose or otherwise, that is all it says, no qualifications.

Mr. Miller: Were these picked up on the 26th day of February?

(Testimony of Jane Metcalf.)

Mr. Stevens: No, that is January .

Mr. Miller: The 26th day of January, they were picked up by the truck driver, but now has this clothing been sent outside since then and you sent out and got them?

Mr. Stevens: That is correct. We recovered them from the estate of the deceased, there is no doubt about that.

Mr. Miller: There is no way of knowing these were [272] the same clothing.

Mr. Stevens: They have the same check marks on them.

The Court: I think she can testify what she observed when the garments were brought to her, and that is the only question I can see that is now before the Court.

Mr. Miller: Not in relation to these garments.

Mr. Taylor: These garments haven't been identified yet, your Honor. It is not our fault that they have taken these things and got them in the condition they are.

Mr. Stevens: I think Mr. Taylor misinterprets the situation. If the defendant alters and removes the spots it is our contention that the very removal of the spots shows a guilty knowledge and a guilty state of mind.

The Court: It is the Court's feeling that the garments have been identified as having come from the defendant, sent to the cleaners by the defendant and this witness has testified that she received them

(Testimony of Jane Metcalf.)

as a part of her official duties. She examined the parka upon receipt and now the witness has been asked as to the condition of it at the time she saw it.

Mr. Stevens: Yes, I believe she has already answered.

Mr. Taylor: What was her answer?

Mr. Stevens: She stated there were blood [273] stains.

Mr. Miller: You going to let her testify as to these exact garments.

The Court: The only one she identified is as to the parka.

Mr. Stevens: The markers are gone.

Mr. Miller: That shows these clothes have been so intermingled——

The Court: It only shows to me that there might be difficulty with the other garments, but this one she seems to positively identify, but now when we get through with our record and we can go back and let's see, I didn't realize she had answered the question that had been propounded. Mr. Taylor didn't seem to be aware of it.

Mr. Taylor: No, she don't talk very plain.

(Thereupon, the reporter read the last question and answer.)

Mr. Taylor: We want that stricken.

The Court: Unless you want to, you want to make the motion here I will strike the answer as not being responsive and then you may proceed.

(Testimony of Jane Metcalf.)

Mr. Taylor: Yeah, I will move that the answer be stricken, the answer to the last question.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:) [274]

Mr. Taylor: Possibly before we proceed, your Honor, maybe we could take the recess at this time.

The Court: It is past three o'clock. See if we can't air out the room while we take a ten-minute recess. Members of the jury, once again it is my duty to admonish you that it is your duty not to discuss the subject matter of this trial with anyone; not to permit anyone to discuss it with you; do not listen to any conversation concerning the subject matter of the trial; do not form or express any opinion thereon until the case is finally submitted to you. We will take a ten minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:05 p.m., the Court took a recess until 3:15 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Once more let the record show the presence of the defendant and his counsel.

Mr. Taylor: We will stipulate that all members of the jury are present, your Honor.

Mr. Stevens: We so stipulate, your Honor.

The Court: Very well, you may proceed.

JANE METCALF

the witness on the stand at the time the recess was taken, resumed the stand for further

Direct Examination

By Mr. Stevens:

Q. Mrs. Metcalf, the items you have examined, are there [275] two tags that you have identified?

A. Yes, there are.

Mr. Taylor: Just a moment, please, I request the Court, subject to our stipulation, it was stipulated while we conferred at the bench that the answer to the last question that has been propounded to the witness should be stricken.

Mr. Stevens: I believe that that was already done.

The Court: Yes, unless Mr. Taylor wishes to make the motion that the answer be stricken, make it now and I will strike it.

Mr. Taylor: Well, I did not know whether the Court had——

The Court: Very well, to clear it up, the answer to the last question will be stricken as not responsive. Now, you may proceed.

Q. (By Mr. Stevens): I will ask you again then concerning these items that you have examined, have you identified the tags on two of them, is that correct?

A. Yes, I have.

Q. And those are the same numbers, are they?

A. Yes, they are.

Q. And you connected that number with a number that appears in this book that I showed to you,

(Testimony of Jane Metcalf.)

Government's Identification 18, that is your book that you marked things in? [276]

A. Yes, it is.

Q. Now, at the time you marked in the, the parka, which is Government's Identification 14, did you notice its condition, just yes or no?

A. Yes, I did.

Q. And what was the condition of the parka at that time?

A. Well, it had some blood stains on it.

Mr. Taylor: Just a moment, we are going to object to the answer. It calls for a conclusion of the witness. I think she should describe the stain without using the adjective as it being blood stains.

The Court: She may answer.

Mr. Taylor: Unless she knows.

Mrs. Metcalf: What?

The Court: It is a little confusing. It is all right. Maybe Mrs. Templeton will read the question and she may answer.

Mr. Stevens: I believe, your Honor, she did answer it. I am not sure that you heard it.

The Court: Well then, Mr. Taylor's was a motion to strike, was it? Very well, the motion is denied.

Q. (By Mr. Stevens): Do you recall what you did with these two items?

A. I just put them in the box with the rest of the clothes. [277]

Q. What is the other item that you identified besides the parka, do you know?

(Testimony of Jane Metcalf.)

A. I believe it is a sweater.

The Clerk: Identification No. 16.

Q. (By Mr. Stevens): That is the sweater you are talking about? A. Yes, it is.

Q. The one that Mr. Hall just had, Identification No. 16? A. Yes.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mrs. Metcalf, what in your book was the number that this parka which you have a number on, what name was that put under?

A. Curly Urban.

Q. You have, do you have your book showing the articles of Myrtle Cathey?

A. No, I don't.

Q. Now, you say that there was stains on this parka? A. Yes, I do.

Q. Would you point out to the jury where the stains were?

A. No, I couldn't do that. [278]

Q. You couldn't see where the stains were?

A. No.

Q. Were they on the front of the parka?

A. I don't remember.

Q. You remember seeing the stains then, Mrs. Metcalf?

A. Yes; but I don't remember where they were.

Q. What did they look like, what color was they?

(Testimony of Jane Metcalf.)

A. Well, looked kind of brown.

Q. And did you, did you have anything to do as to what particular type of cleaning, what particular type of cleaning fluids are used for particular stains?

A. Do I know?

Q. No, do you have anything to do with when you mark them or send them back to the cleaners?

A. No.

Q. Well, then, you can't, you don't know where you saw brown stain on this parka then, is that right?

A. Well, it is just on there.

Q. What?

A. It was just on there, on the parka.

Q. But you don't know where though. Now, did you have any tests made as to what that stain was?

A. Well, it was blood.

Q. How did you know it was blood; how could you tell, Mrs. Metcalf, the difference between raspberry or strawberries [279] or a stain of blood on a red parka, or a red garment such as that could you tell the difference?

A. No, I really couldn't.

Q. So then while you are using the word blood here is because it happened to be that the District Attorney or somebody has talked to you about blood stains on this garment?

A. I don't believe he mentioned blood on there.

Q. But you don't know whether there was any blood stains on there or not then, do you? Were you just assuming, Mrs. Metcalf, that because this was a case involving a homicide and you are going to

(Testimony of Jane Metcalf.)

testify here, that you would say this was blood stains; you say you wouldn't know the difference between strawberries or raspberry jam or anything like that?

A. Well, to me it was blood that is all I can say.

Q. You just assumed it was blood, is that right?

A. Well, I checked some clothes in that had blood stains on it.

Q. Did you ever get any clothes in there that had raspberry stains on them?

A. No, I have never checked any.

Q. That you know of; would you have got clothes in with raspberry stains on that you thought was blood on it? A. No.

Q. How do you know?

A. Well, I have never checked any clothes in with stains. [280]

Q. You assumed because they were brown that it was blood, is that right? A. I don't know.

Q. Isn't it a fact that you just jumped to the conclusion that was blood, Mrs. Metcalf?

A. Yes.

Q. Did you find any stains on this little sweater?

A. No, I don't recall any of the other clothes at all with stains on them.

Q. You don't know whether there was any stains on this one or not? A. No, I sure don't.

Q. And you don't find any tags on these other garments, is that right? A. No.

Q. Did you examine these for tags?

A. Yes, I did.

(Testimony of Jane Metcalf.)

Q. You could not find any?

A. No, I couldn't.

Q. You know how they happened to get mixed up here with the red jacket and the sweater?

A. No, I don't.

Mr. Taylor: That's all, Mrs. Metcalf.

Mr. Stevens: Thank you, Mrs. Metcalf.

(Witness excused.) [281]

Mr. Stevens: Call Mr. McVeigh, please.

DON McVEIGH

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you tell us your name, please?

A. Don McVeigh.

Q. Where do you live, Mr. McVeigh?

A. Northward Building, 426.

Q. Do you have a business here in Fairbanks?

A. Yes, I do.

Q. What business is that, sir?

A. Dry cleaning business.

Q. And where is that business located?

A. 308 Wendell.

Q. Do you handle any part of the business yourself, personally?

A. Yeah, I am the spotter. I do the cleaning and spotting.

(Testimony of Don McVeigh.)

Q. Are you familiar with the type of markings that you use in your plant? A. Yes.

Q. This is Government's Identification 14, Mr. McVeigh, could you ascertain if there is any mark in that that you can [282] recognize?

A. Yeah. That is my mark right there.

Q. And Government's Identification 16, also, Mr. McVeigh, is there a mark in that that you recognize?

A. Yeah.

Q. Would you tell us whether those marks similar or anyway you can connect the two items together?

A. Yeah, they both came in at the same time.

Q. They got the same number on them?

A. Yes.

Q. Do you have any recollection of handling those items? A. Yeah, I do.

Q. Do you remember when that was, approximately? A. Yeah.

Q. When was that, sir, if you remember?

A. They come in the 26th of January.

Q. And did you know at that time whose garments those were? A. Yes.

Q. Whose garments were they?

A. Well, they come from the Alibi Club and——

Q. Don't examine the tags to refresh your memory, please.

A. They come in from Curly's place. Pat's [283] clothes.

Q. Had you seen the parka before that day?

A. Yeah, I cleaned it a lot of times.

(Testimony of Don McVeigh.)

Q. You cleaned it before? A. Yeah.

Q. And at the time you cleaned it in January, would you tell us the condition of the parka?

A. Well, there was blood in it here in the hood, down each side.

Q. Did you have anything to do with restoring the parka to the condition it is now in?

A. Yeah, I did it myself.

Q. You removed the blood from it?

A. Yes.

Q. Do you recall the other item that you have in your hand at all? A. Yeah, the sweater.

Q. The sweater. A. Yeah.

Q. What was the condition of that item?

A. Well, there was a little blood down the front of it.

Q. And did you also remove that, sir?

A. Yes.

Q. Do you know, you stated that you had cleaned the red parka before? A. Yes. [284]

Q. Do you know whose it was? A. Yes.

Q. Whose was it?

A. Well, it come in from the same place.

Q. From the Alibi Club? A. Yes.

Q. Do you know who out there sent it in?

A. Well, Curly paid for it. It was Pat's.

Q. It was Pat's? A. Yes.

Mr. Stevens: Thank you very much, Mr. McVeigh. Your witness, Mr. Taylor.

(Testimony of Don McVeigh.)

Cross-Examination

By Mr. Taylor:

Q. Mr. McVeigh, how did you come to the conclusion that there was blood on the red garment?

A. Well, to be truthful I wouldn't know, but that is what I treated it for. Does that answer your question?

Q. What color was the stain?

A. Well, it was, would be, well, it would be a kind of a dark brown stain.

Q. That in your experience of handling garments that have had blood on them is the customary that the stains are, dark brown?

A. Yes. [285]

Q. And let me hold that up and will you show the jury just where the blood showed on that garment, Mr. McVeigh, was there any on the inside?

A. Well, yeah. It was in here and down each side. There wasn't much, there was very little on the outside. It was on the inside right here. You can see where I worked.

Mr. Stevens: I'm sorry, Mr. McVeigh. I can't quite hear you.

Mr. McVeigh: I said the blood was here in the hood and down the front on the inside on each side. None on the outside.

Q. (By Mr. Taylor): None on the outside, is it, very little on the outside? A. Very little.

Q. And what would you say as to the amount

(Testimony of Don McVeigh.)

on the inside on each side? A. The amount?

Q. Yeah.

A. Well, I don't know as I could explain the amount.

Q. I mean but what area was covered with blood on each side?

A. Well, you see, you see right here is where I worked, right here and right in here. I worked right there. I worked here, and then I worked [286] here.

Q. I take it then it wasn't all drenched with blood; there was just three spots around here, is that right? A. That's right.

Q. And on the other side, what does it show then?

A. Well, here is a spot there, I worked, right here and another one here. There is one there and one here.

Q. And those would be just spots then, Mr. McVeigh?

A. Yeah, they would be areas right here, right here, right in here.

Q. And then the other stains were on the inside, is that right? A. Inside of the hood.

Q. Then I take it if a person had the nosebleed then he would have to have his face down in that hood to get it soaked with blood or stained with blood? A. That's right.

Q. Do you have any extra charge for removing blood stains? A. Yeah, I do.

(Testimony of Don McVeigh.)

Q. Now, going to ask you again, you say that you cleaned this parka quite a few times before?

A. Yes, I have.

Q. Have you cleaned garments belonging to Myrtle Cathey before? A. Yes.

Q. Would you state whether or not on any of the previous occasions had you removed blood stains from the clothing of Myrtle Cathey?

A. I don't know for sure. You want a sure statement, I guess, so I don't know.

Q. Well, you can state what you believe or what you think, the fact that you cleaned this one, if it would refresh your memory as to any other occasions that you found blood on clothing of hers?

A. I wouldn't say. I couldn't be sure. I don't know.

Q. You are doubtful, are you?

A. Yes, I am.

Mr. Taylor: That's all.

Mr. Stevens: Thank you, very much, Mr. McVeigh.

Do you have anything further of Mr. McVeigh?

Mr. Taylor: Nothing further.

Mr. Stevens: Thank you very much.

(Witness excused.)

Mr. Stevens: Call Mr. Goodfellow. At this time we would like to offer Government's Identifications 14 and 16 being the two garments just described and identified by Mr. McVeigh and Mrs. Metcalf.

Mr. Taylor: If the Court please, we are going

to object upon the grounds the garments are not in the condition, there has been substantial alteration of their appearance since the time of the crime and that under the law and the facts [288] developed hereto, we do not believe there has been sufficient identification of the garments; and also the fact that they have not, the appearance of them have been altered and there is no substantial reason why they should be taken, should go to the jury.

The Court: The Identifications will be received.

The Clerk: Identification No. 14, the parka, is Government's Exhibit H, and No. 16, the sweater is Government's Exhibit I.

(Government's Identification No. 14 was admitted in evidence as Government's Exhibit H.)

(Government's Identification No. 16 was admitted in evidence as Government's Exhibit I.)

JAMES J. GOODFELLOW

recalled as a witness in behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Goodfellow, you have previously been sworn in this case, have you not?

A. Yes, sir, I have.

Q. And you have told us your occupation as Territorial Policeman? A. I have. [289]

Q. I want to call your attention to the evening of the 30th day of January of this year and ask

(Testimony of James J. Goodfellow.)

you if you were engaged in your occupation as Territorial Policeman on that day?

A. I was.

Q. Do you know Mr. Urban? A. I do.

Q. Did you see him that evening?

A. It was shortly after midnight. It would be early morning of the 31st.

Q. You did see him at that time?

A. I did.

Q. Where was it that you saw him?

A. In St. Joseph's Hospital.

Q. Where in the hospital were you at that time?

A. On the third floor.

Q. Did you know Myrtle Cathey?

A. Not at that time.

Q. Was your presence in the hospital in any way connected with Miss Cathey? A. It was.

Q. How was that, what was the connection?

A. The nurse had called and requested a police officer to come to the hospital.

Q. Do you recall the nurse's name?

A. Mrs. Maybell Bray. [290]

Q. What time was it, approximately, that you saw Mr. Urban there?

A. Shortly after midnight, about ten after midnight, ten minutes after midnight.

Q. Did you have a discussion with Mr. Urban at that time? A. I did.

Q. Was there anyone else present during that discussion? A. No, sir.

Q. And that was on the evening of the 30th or

(Testimony of James J. Goodfellow.)

the early morning hours rather of the 31st of January, this year? A. Yes, sir, that's right.

Q. Is that correct, 1955?

A. That is correct.

Q. Would you tell us the conversation that you had with Mr. Urban?

A. I asked Mr. Urban what he knew about the condition of Mrs. Cathey. The night supervisor there, this Mrs. Bray, had told me that she felt——

Mr. Taylor: Just a moment, object to the hearsay.

The Court: Yes, you will not be permitted to say what——

Mr. Taylor: He should know that.

Mr. Stevens: I object to the last statement; ask [291] that it be stricken, your Honor.

The Court: It may be stricken. Proceed.

Mr. Goodfellow: I asked Mr. Urban for an explanation between——

Mr. Taylor: Just a moment, we are going to object to the conversation, your Honor, on the grounds it is an investigation by a police officer, the proper warning had not been made as to whether or not he was under arrest or that anything he said would be used against him.

The Court: He may testify to the conversation with Mr. Urban at that time.

Q. (By Mr. Stevens): Will you, please, continue, Mr. Goodfellow?

A. Mr. Urban had told me that there was nothing to be alarmed about over Mrs. Cathey's condi-

(Testimony of James J. Goodfellow.)

tion, that it was just a hair-pulling contest that had occurred between Mrs. Cathey and another woman who he didn't know by name but had been in the Alibi Club at various times, and that he wasn't sure whether the hair-pulling contest as he described it, had occurred at this other woman's house or just where it was or what the cause of it was, but he stated that Mrs. Cathey he was sure would not want to sign a complaint and I informed Mr. Urban at that time that if Mrs. Cathey was not in serious condition and that she didn't wish to sign a complaint that our department wouldn't be interested in it, but if Mrs. [292] Cathey died that we would be interested in the, we would want to know all about it and he at that time told me that should that happen he would get busy and supply me with the names of the people involved, but that he didn't want to tell me right then because it would just drag in a bunch of other people that he didn't want to be involved in at that time.

Q. Did your discussion pertain to the condition of Mrs. Cathey? A. Yes, sir.

Q. What was that part of the discussion?

A. I asked Mr. Urban for an explanation between the difference in the way the nurse had described her condition to me and what he said was the matter as he described it as just a hair-pulling contest, just a little tussle.

Q. Did your discussion pertain to what specifically had happened to cause Mrs. Cathey to be in the hospital?

(Testimony of James J. Goodfellow.)

A. Mr. Urban told me that she had been in a fight with another woman.

Mr. Taylor: We object, your Honor, repetition, already been gone into.

The Court: It is perhaps repetitious but I think it was caused by the disturbance in the room. Proceed.

Mr. Goodfellow: Mrs. Cathey had been involved in a fight with another woman and that when, I asked when and attempted to pin it down to a date he said either the 22nd [293] or the 23rd of January and that everything was all right with Mrs. Cathey until the evening of the 30th when he was rubbing her back and she said she wanted to look up at the ceiling and her neck popped real loud and she passed out.

Q. (By Mr. Stevens): Did you obtain a description of this woman?

A. Mr. Urban gave me a description of this woman, yes.

Q. Do you recall what that was?

A. As I recall he said the woman would be about five three or five four inches in height, around a hundred thirty pounds in weight, with dark hair and that he believed her first name was Peggy.

Q. And this was the woman that you have referred to with whom Miss Cathey had purportedly been in some sort of a struggle?

A. Yes, sir, that is the description.

Q. Did you ask or did any of your discussion pertain to the address where Miss Cathey lived?

(Testimony of James J. Goodfellow.)

A. Yes, sir.

Q. What, where did you discover that she lived?

A. Mr. Urban said she had an apartment in the Alibi Club.

Q. Was there any further discussion pertaining to her relationship to the Alibi Club?

A. Mr. Urban said they were sort of going together, that her name was on the license, liquor license there. [294]

Q. Have you had an opportunity to observe Mr. Urban's general physical appearance?

A. Yes, sir, several times.

Q. How big would you say he is?

A. Six foot, six foot one, somewhere in there.

Q. Approximately how much does he weigh?

A. Two-twenty, two hundred thirty pounds.

Q. What would you say his build is?

A. I would say he was stocky built, heavy built.

Q. Did you see Mr. Urban later on the same morning?

A. Yes, sir.

Q. And where was that?

A. At the city police station.

Mr. Taylor: Where?

Mr. Goodfellow: City Police Station.

Q. (By Mr. Stephens): Do you recall the time?

A. Approximately two-thirty.

Q. Do you know what Mr. Urban was there for?

A. Yes, sir.

Q. What was he there for?

(Testimony of James J. Goodfellow.)

A. He had brought a letter there with Mrs. Cathey's relatives' address on it.

Q. He was there voluntarily?

A. He was. [295]

Q. Was there anyone else there at that time that you recall? A. Yes, sir.

Q. Who was that?

A. Sergeant Frank Wirth of the city police, Sergeant David John of the city police and Officer Byrom of the city police.

Q. Did you have a conversation with Mr. Urban at that time? A. I did.

Q. What was your conversation with him?

A. I asked him for another description of that woman that he had told me about over in the hospital. I asked him specifically what her name was.

Q. What was the reply?

A. He had forgotten.

Q. What was the rest of your conversation, if there was anything further?

A. I asked him to look at his hands and he showed me his hands. The conversation was concerning the possibility of whether he had given Mrs. Cathey the beating.

Mr. Taylor: Just a moment, your Honor, going to object to that, the witness should know better than to indulge in what possibilities might happen.

Mr. Stevens: The conversation pertained to the possibility. [296] There is no question of possibility involved. I believe the officer's testimony should stand.

(Testimony of James J. Goodfellow.)

The Court: I believe the witness should be careful and state what was said rather than conjecture.

Q. (By Mr. Stevens): What was said concerning that subject?

A. Mr. Urban was asked if he had beaten Mrs. Cathey as a result of jealousy and Mr. Urban said he had not. He was asked if he had ever beaten her and he replied that he had roughed her up a couple of times.

Q. Did you see Mr. Urban again in connection with the death of Miss Cathey? A. I did.

Q. Do you recall when that was?

A. On February 4th.

Q. And where was that meeting?

A. In the Alibi Club.

Q. What time was that?

A. It was in the evening. I am not sure of the time.

Q. Was there anyone with you at that time?

A. Yes, sir.

Q. Who was that?

A. Sergeant Wirth of the city police.

Q. Was there anyone at the Club other than Mr. Urban? A. Yes, sir. [297]

Q. Do you know who that was?

A. I don't recall. I didn't pay any attention.

Q. How many other people were there?

A. Oh, I would say a half a dozen.

Q. What took place there at that time?

A. We talked to Mr. Urban again.

Q. Where did you talk to him?

(Testimony of James J. Goodfellow.)

A. In the bedroom.

Q. Is that located in the club itself?

A. Yes, sir.

Q. Was there anyone other than Mr. Wirth and you and Mr. Urban at that time? A. No, sir.

Q. Do you recall the conversation at this time?

A. I do.

Q. Would you tell us the conversation as you recollect it?

A. Mr. Urban at that time told us that the story that he had told me in the hospital was not true, that there was no other woman and that it was only a story that Mrs. Cathey had requested that he tell, so that she wouldn't get arrested, and then he went on to say what he knew about the circumstances surrounding her beating.

Q. What was that that he stated to you concerning that, the circumstances? [298]

A. He stated that on the morning of January 22nd he received a telephone call from Mrs. Cathey. She said she was at the Players Club and she had asked him to come down there, that he had went down there; that they had had a few drinks there and that they had gone back to the Alibi; that they had, I believe two or three drinks he said in the Alibi Club and then Mrs. Cathey wanted to go out again. He said that he told her that it would be better to go to bed. She said she was going out anyhow and walked out and slammed the door; that he went to bed and that he hadn't seen her again until about two or two-thirty on that afternoon

(Testimony of James J. Goodfellow.)

when she was knocking at the door and she was beaten at that time.

Mr. Taylor: Just a moment, your Honor, I am going to object to that last question unless there is an explanation about the——

The Court: I think it should be clarified.

Mr. Taylor: I move to strike the word beaten at that time.

Mr. Stevens: Just a minute, your Honor, I believe that Mr. Goodfellow was relating a conversation of the defendant.

The Court: Yes, but beaten at that time, I think that should be clarified.

Q. (By Mr. Stevens): What did the conversation pertain to on that point; [299] do you understand the problem, Mr. Goodfellow?

A. No, sir, I don't.

Q. The implication she was beaten at that time, Mr. Urban stated he had beaten her or she was beaten when he opened the door?

A. He opened the door and Mrs. Cathey was there all bloody and beaten; that he had taken Mrs. Cathey in, had put her to bed and called a taxicab and had tried to get Mrs. Cathey to go to the hospital but Mrs. Cathey had refused to go to the hospital and that later on that evening he had called the doctor.

Q. Now, Mr. Goodfellow, do you know a Mr. Vic Hart? A. I do.

Q. Do you know what business he is connected with? A. I do.

(Testimony of James J. Goodfellow.)

Q. What business is that?

A. Radio Cab Company.

Q. Have you ever had occasion to see Mr. Hart in connection with this case? A. I have.

Q. This is Government's Identification 13; could you tell us what that is?

A. This is a trip ticket that I obtained from Mr. Hart.

Q. And do you know, strike that, please. What did you go to Mr. Hart's place of business [300] for? A. To obtain this trip ticket.

Q. Did you have a specific date in mind?

A. Yes, sir.

Q. What date was that? A. January 22nd.

Q. Of 1955? A. Of 1955, yes, sir.

Q. And did you have a particular cab number in mind? A. Yes, sir.

Q. What cab number was that?

A. Twenty, two, zero.

Q. And did you assist in the search for that ticket?

A. I was with Mr. Hart when he found it.

Q. Do you know what date that ticket you have there, Government's Identification 13, pertains to?

A. I do.

Q. What date is that? A. January 22nd.

Q. Did you place any mark on the ticket at the time you found it? A. I did.

Q. What mark did you place on it?

A. The initials on the back.

(Testimony of James J. Goodfellow.)

Mr. Stevens: At this time the Government moves the [301] admission of Government's Identification 13.

Mr. Taylor: We object to that, your Honor. There is no connection of that exhibit with this defendant, there is no testimony that on that trip in question the defendant or the deceased rode in that cab. Unless he could testify to that your Honor, I don't think it is admissible. I don't see where even if they did connect it up that way where it adds to or detracts from this case whatsoever. It looks to me like superfluous exhibit they are trying to get in, bury the jury in exhibits; no connection at all.

The Court: The Court feels that it is relevant and will admit it.

The Clerk: Government's Exhibit J.

(Government's Identification No. 13 was admitted in evidence as Government's Exhibit J.)

Mr. Stevens: May we have the recess at this time, your Honor?

The Court: Members of the jury, once more I admonish you to not discuss this case with anyone; do not permit anyone to discuss it with you; and not to listen to any conversation concerning the subject of the trial; do not form or express any opinion until the case is finally submitted to you. We will take a ten minute recess.

The Clerk: Court is recessed for ten [302] minutes.

(Thereupon, at 4:05 p.m., the Court took a recess until 4:15 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Let the record show the presence of the defendant and his counsel. Mr. Stevens, you had something to take up in the absence of the jury.

Mr. Stevens: Your Honor, we have been considering the objection made by counsel concerning the five pictures that were identified by Mr. Douthit. To my recollection there was only one mention of a spot at one time. There was no discussion of blood stains at that time and due to the fact that we cannot establish the condition of the room where those pictures were taken on the 22nd or the 23rd and we did not gain access to the room until the arrest, we think that perhaps they may be remote and we would consent to the motion of the defense to strike those exhibits, or strike the Identifications and will not pursue that line of questioning.

The Court: Has that motion been made by the defense?

Mr. Stevens: I believe he objected very strenuously to the testimony on the ground that they were remote from the time of the occasion due to the time of the arrest. We believe that they are relevant but they are remote and we have no way of establishing the condition of the room on the morning of the events that are charged in the indictment. We believe [303] that the objection has merit because of the quality.

The Court: What are the Identification numbers?

The Clerk: Nos. 8 to 12, your Honor.

The Court: Mr. Taylor, is that your motion?

Mr. Taylor: I think at the time we made the motion it was during the conference at the bench. I don't know whether I made it in those words. I would strenuously object if they were going to be offered. At this time, your Honor, for the purpose of the record, I will make a formal objection to the introduction of those particular Identifications.

Mr. Stevens: We were withdrawing the Identifications and consenting to the motion to strike Mr. Douthit's testimony pertaining to those Identifications.

The Court: Very, well. So ordered. It will be stricken.

Mr. Stevens: May we recall the jury at this time, your Honor?

The Court: Very well.

(At this time, the jury entered the courtroom.)

The Court: Parties wish to have the jury polled?

Mr. Taylor: No, we will stipulate they are all present, your Honor.

Mr. Stevens: We so stipulate.

The Court: Very well. Proceed. [304]

JAMES J. GOODFELLOW

the witness on the stand at the time the recess was taken, resumed the stand.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mr. Goodfellow, the time that you had the first conversation at the hospital with Mr. Urban, did the fact that the nurse or the supervisor was present, Mrs. Bray?

A. Mrs. Bray was present during our conversation?

Q. Yes, sir. A. No, sir.

Q. Well then, if she testified she was present during the conversation she would be wrong then, is that right?

A. She may have been there at intermittent parts, but she wasn't there during the, not continuously.

Q. Now, you stated that Mr. Urban stated at a later conversation that he had roughed up Miss Cathey a couple of times, what did you, did he elaborate on that as to what that meant?

A. No.

Q. I suppose several meanings could be given to that particular phrase, could they not?

A. Depending upon the individual, I guess.

Q. Well, Mr. Goodfellow, after Mr. Urban told you the [305] story about her, about Mrs. Cathey coming home at two o'clock in the afternoon, did

(Testimony of James J. Goodfellow.)

you make any investigation in that particular area of town, in South Fairbanks, to ascertain who had inflicted the injuries upon Miss Cathey?

A. Yes, sir.

Q. Mr. Goodfellow, did you know at the time that you talked with Mr. Urban at the hospital that it was through Mr. Urban's alarm at the condition of Miss Cathey that caused her to be in the hospital?

A. At that time the only thing I knew was that Mr. Urban had accompanied Mrs. Cathey to the hospital and that Mrs. Bray had asked him to stay there.

Q. And then after did you talk to Doctor Anderson?

A. No, sir, I did not.

Q. And did you after that ascertain that Mr. Urban alarmed at the condition of Miss Cathey had called Doctor Anderson to come to the Alibi Club on the evening of January 31st?

A. When are you speaking of Mr. Taylor?

Q. January 31st, when she was taken to the hospital.

A. No, sir, I didn't see Doctor Anderson on the 31st of January.

Q. Well, did you since learn though that it was through Mr. Urban's alarm at her condition that he called Doctor [306] Anderson and Doctor Anderson did take Miss Cathey to the hospital?

Mr. Stevens: I object, your Honor, it would be self-serving; it would be hearsay where he got the information anyway.

The Court: He may answer if he knows.

(Testimony of James J. Goodfellow.)

Mr. Goodfellow: I believe Doctor Anderson said he did. I don't know for sure. I don't know that Mr. Urban called Doctor Anderson, no.

Q. (By Mr. Taylor): Did you know Doctor Anderson came down to the Alibi Club on the evening of January 31st? A. Yes, sir.

Q. But you don't know who called him?

A. I can't say who called him.

Q. And you don't know whether Doctor Anderson went out there of his own volition or not?

A. According to Doctor Anderson he was called out there.

Q. Then Mr. Urban accompanied the injured person to the hospital, is that right?

A. As far as I know he did.

Mr. Taylor: I believe that's all, Sergeant Goodfellow.

Mr. Stevens: Thank you very much. [307]

(Witness excused.)

Mr. Stevens: Call Sergeant Wirth.

FRANCIS X. WIRTH

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Francis X. Wirth, Jr.

Q. What do you do, Mr. Wirth?

(Testimony of Francis X. Wirth.)

A. I am a Sergeant on the city, Fairbanks, Alaska, City Police Department.

Q. Do you know Mr. Urban, Mr. Wirth?

A. I do.

Q. Were you a city policeman in January of 1955? A. I was.

Q. Did you have any connection with the investigation concerning the death of Myrtle Cathey?

A. I did.

Q. In connection with that did you see Mr. Urban? A. I did.

Q. When is the first time you saw Mr. Urban in connection with it?

A. Approximately two forty-five a.m. on the morning [308] of January the 31st, 1955.

Q. And where was that?

A. That was at the City Police Station, Fairbanks, Alaska.

Q. Was there anyone with you there?

A. There was Sergeant Dave John and Officer Goodfellow of the Territorial Police, and Officer Byrom, Donald Byrom.

Q. Did you have a conversation with Mr. Urban there? A. I did.

Q. What was that conversation?

Mr. Taylor: I don't believe the proper foundation has been laid, your Honor, as to who was participating in the conversation, who was present.

The Court: I think he may answer.

Mr. Wirth: I asked Mr. Urban how Pat Cathey had been hurt and he asked me or, excuse me, he

(Testimony of Francis X. Wirth.)

told me that Pat had been beaten by some woman.

Q. Do you recall any further part of that conversation? A. I do. I asked, yes, I do.

Q. What was that?

A. I asked him if he knew who the woman was and he said he did not.

Q. Did you see Mr. Urban again concerning this same matter? [309] A. I did.

Q. Do you recall when that was?

A. That was on February the 4th.

Q. And where did you see him?

A. At the Alibi Club on South Cushman Street.

Q. Was there anyone with you at that time?

A. Officer James Goodfellow of the Territorial Police was with me.

Q. Did you have a conversation with Mr. Urban at that time? A. I did.

Q. Do you recall the approximate time of day?

A. I do not.

Q. Do you recall the 4th day of February, is that correct?

A. I do. It was in the evening but I don't remember the approximate time.

Q. Where did the conversation take place?

A. It took place in a bedroom off the bar at the Alibi Club.

Q. And what was the conversation at that time?

A. Mr. Urban told us that he wanted to tell us the true way that Pat Cathey had been hurt and that he wanted to change the story that he had told us previously.

(Testimony of Francis X. Wirth.)

Q. And what did he tell you at that time? [310]

A. At that time he told us that Pat Cathey had gone, had left the Alibi Club on the early morning of January, January the 22nd and that she did not return until about three p.m. that afternoon. Excuse me. That's right, three p.m. that afternoon, that when she did return she had been beaten and she told him that some man had beaten her and had taken her money; that she came in and sat down on a stool at the bar and wanted a shot and when she, while she was sitting at the bar she fell backward off the stool and hit her head on the floor and her neck popped like a cannon, Mr. Urban said. He said he then called Ted Beasley, the Vet's cab driver and he and Mr. Beasley tried to get Pat Cathey to go to the hospital. Pat did not want to go to the hospital. Therefore, Mr. Urban and Mr. Beasley tried to forcibly take Pat to the taxi which Mr. Beasley had but they could not get her off the bed and therefore, Mr. Urban called Doctor Anderson. Doctor Anderson came out, went out to the Alibi Club and gave Pat a shot which quieted her at that time.

Q. You recall any of the rest of the conversation at that time, if there was any further conversation?

A. Well, Mr. Urban asked me to advise him at that time and I told him that the only way I could advise him was to get a lawyer. We asked him if he would go with us to the Territorial Police Station

(Testimony of Francis X. Wirth.)

to go over this statement again and [311] he complied with that request. He did go with us.

Q. Did he, did your discussion pertaining to any further incidents that took place during Miss Cathey's lifetime?

Mr. Taylor: If the Court please, we are going to object to that. It is so indefinite it is a little indefinite and might be a shotgun question. I think he should pinpoint it down a little bit, your Honor.

Mr. Stevens: I will be glad to, your Honor.

Q. (By Mr. Stevens): Did your discussion pertain to anything on the 30th day of January, 1955?

A. Yes, it did.

Q. What was that part of the discussion?

A. The part that I remember about the 30th right off is that Mr. Urban said that he was asked by Pat Cathey to rub her back that afternoon, and when he did he noticed a bruise on her back where she had bumped her back while she was dancing the night previously. He said she had bumped it on the corner of a table and he said while he was rubbing her back she tilted her head back and tried to look at the ceiling and that her head popped again the same as it had the night when she fell off the stool.

Q. During these conversations did you ascertain where Mrs. Cathey lived? [312]

A. I did.

Q. Where was that?

A. In this same bedroom where we were talking with Mr. Urban off the bar at the Alibi Club.

(Testimony of Francis X. Wirth.)

Q. Did you ascertain how long she had been living there?

A. If I did I don't remember. It was, I don't remember just how long he stated.

Q. Did any of your discussion pertain to the reason for the first explanation Mr. Urban had given you concerning Miss Cathey's condition?

A. Yes, he said that Pat knew that she was going to the hospital and she was afraid that if something happened to her that she didn't want the story to get back to her relatives that she had been, had been a working girl and had been hurt while out with a man and so they, she, excuse me, Pat wanted Mr. Urban to tell this story about being beaten by the woman.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Now, Mr. Wirth, when you first saw Mr. Urban at the police station what particular business was he there on?

A. He came to the police station to bring us an, excuse me, an address and the address was that of relatives of Pat Cathey in Montana.

Q. Was you acquainted with Pat Cathey during her lifetime? [313]

A. I didn't know the girl, no.

Q. Now, did you talk to Mr. Urban at the police station about this incident?

A. I did.

(Testimony of Francis X. Wirth.)

Q. Was that the time he told you Miss Cathey had been beaten by a woman?

A. That is true.

Q. Was that the same night that he brought the address of Miss Cathey's relatives?

A. That is true.

Q. And then when was the next time you talked to him? A. On the 4th of February.

Q. Fourth of February? A. Right.

Q. Did you get a statement at that time from Mr. Urban?

A. The Territorial Police took a statement from Mr. Urban.

Q. Did he sign it?

A. Not to my knowledge.

Q. And you say the next talk you had with him was on the 4th of February, is that right?

A. That is correct.

Q. And who was present then?

A. When the statement was taken at the Territorial Police Station Officer Goodfellow and Lieutenant Mayfield and myself were present. [314]

Q. Now, when Mr. Urban stated that Miss Cathey had come in all beaten up and that she fell off of a stool and hurt her neck, was Sergeant Goodfellow there?

A. I believe that he was unless he stepped out of the room for a minute. I believe he was there at the time.

Q. And you believe he was there all the time, is that right?

(Testimony of Francis X. Wirth.)

A. Not all the time, sir. He was, he did step out of the room, I remember at one time for just a minute.

Q. How long did he step out?

A. It was just out and right back. It was just, he went out to the outer office for something but it was just a matter of a few seconds, I believe.

Q. And was that at the same time you mentioned about rubbing her back and noticing the swelling?

A. I don't remember him mentioning any swelling. He mentioned a bruise and about rubbing her back, yes.

Q. And he said that it popped, the neck popped?

A. Yes.

Q. Like as if a vertebrae was out of place?

A. He didn't mention that, no.

Q. Did you get that impression, the vertebrae popped back in place? A. No, I didn't.

Q. What impression did you get that she broke her neck? [315]

A. I didn't, I didn't reach any conclusion on that, sir.

Q. It didn't register?

A. The thing that registered is that every time she fell he said she popped her neck like a cannon.

Q. That was twice he spoke about that. Now, where was she supposed to have fallen the first time off the bar stool?

A. Where had she fallen?

Q. Yeah, where would that take place?

A. At the Alibi Club.

(Testimony of Francis X. Wirth.)

Q. Sergeant Goodfellow was there at the time that he mentioned that, is that right?

A. He was there with me.

Q. Was this the time that you talked to Mr. Urban at the Alibi Club?

A. Was this the time, did you say?

Q. Yeah.

A. He mentioned it at the Alibi Club and again at the Territorial Police.

Q. At both of these conversations was Sergeant Goodfellow there?

A. Yes, he was, but at the Alibi Club Officer Goodfellow stepped out to the bar for a minute while Curly wanted to talk to me. [316]

Q. You say you hadn't been acquainted with Myrtle Cathey then in her lifetime?

A. No, I hadn't been.

Q. You know her when you see her?

A. No, I didn't.

Q. Did you ever have any reason to go into the Alibi Club prior to that time?

A. Yes, I did.

Q. You ever see her there tending bar?

A. No, I didn't.

Q. You know she was part owner?

A. I didn't before this happened, no, sir.

Mr. Taylor: That's all.

(Testimony of Francis X. Wirth.)

Redirect Examination

By Mr. Stevens:

Q. Mr. Wirth, just one thing, you have told us part of a conversation that took place down at the Territorial Police Station, is that correct?

A. Yes.

Q. In addition to what you and Mr. Goodfellow talked to Mr. Urban about at the Alibi Club on the 4th?

A. In addition, yes.

Q. In other words, there were two conversations you participated in on the 4th, is that correct?

A. That is correct. [317]

Q. Was there anyone else at the Territorial Police Station besides Mr. Goodfellow?

A. Yes.

Q. Who was that?

A. Lieutenant Mayfield.

Mr. Stevens: Thank you very much.

Recross-Examination

By Mr. Taylor:

Q. Mr. Wirth, would it be possible for you to get a copy of the statement that was taken down at the police station?

A. If there was——

Q. Bring that here tomorrow morning.

A. A statement in writing?

Q. Yeah, statement of Mr. Cathey.

Mr. Stevens: I believe that is an improper way

(Testimony of Francis X. Wirth.)

to make a demand for production of any evidence, your Honor.

The Court: I didn't recall that the witness said that a statement was signed by the defendant. Did you so testify?

Mr. Wirth: No, I did not, sir.

Mr. Taylor: He stated, your Honor, I believe there was a statement taken there.

The Court: I didn't understand his testimony that way but I don't wish to put any judgment and memory ahead of [318] yours. We will have to read the transcript to——

Mr. Taylor: I don't think it is material, your Honor. I am not particular.

The Court: Very well.

Mr. Taylor: I have a method of getting it.

The Court: All right.

(Witness excused.)

Mr. Stevens: See if Mr. Trafton is there, please.

The Clerk: Government's Identification No. 19.

(Plat showing bedroom of Alibi Club was marked Government's Identification No. 19.)

WILLIAM TRAFTON

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. State your name, please.

A. William Trafton.

Q. What do you do, Mr. Trafton?

A. Employed by the Department of Territorial Police.

Q. How long have you been a territorial policeman? A. Five years in March.

Q. This is Government's Identification 19, Mr. Trafton, would you tell us what that is? [319]

A. This is a room in the Alibi Club which is located at Twenty-third and Cushman and is the room used as a bedroom out there.

Q. What is the Identification though; it is a drawing of some type?

A. It is a drawing of scale of the bedroom and the furniture that is in the bedroom at the time the drawing was made.

Q. Do you know who made that drawing?

A. I made the drawing.

Q. When did you obtain the information for that?

A. The information was obtained on the night of the 26th of February.

Q. Of this year? A. Of this year.

Q. And how were the measurements obtained, by actual measurements?

(Testimony of William Trafton.)

A. Measurements were obtained by actual measurements by myself and Max Rodgers.

Q. Is that a scale drawing as close as you can make it?

A. This is a scale drawing. The scale is one inch to a foot and the outside measurements of the room are correct as close as you can make it by this graph paper. The furniture inside the room is drawn in proportion to the room and it is not to scale. [320]

Q. It is approximate locations?

A. It is the location, the approximate location of the furniture at that time.

Q. Where is that room located in relation to the bar of the Alibi Club?

A. It is to the north of the bar.

Q. As you go in the door, which way is it, the front door?

A. You go in the front door, you jog a little to the left when you go in and then you head straight into the bedroom.

Q. You viewed the room at that time when you were in there yourself, personally?

A. Yes, sir, I did.

Q. And does that diagram you have made fairly represent the location of the physical objects in that room at that time?

A. It does.

Q. Are there any extraneous comments on that other than just the location of the physical objects and the explanation of those objects?

A. No, sir.

(Testimony of William Trafton.)

Mr. Stevens: We offer that Identification as an exhibit.

Mr. Taylor: We object, your Honor, upon the grounds it is immaterial, irrelevant, incompetent, don't truthfully [321] show the, depict the Alibi Club, the entrance to the bedroom, too remote in point of time. It was drawn by Mr. Trafton on February the 26th, a month after the death of Cathey, no proper foundation has been laid that the furniture in the room on the 26th day of February was the same identical furniture that was in there on the 22nd day of January, 1955.

The Court: The Court can't see the relevancy of the exhibit at this time. I will, therefore, deny the offer at this time.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: I don't think I've got a question to ask him.

Mr. Stevens: We withdraw the exhibit. That's all, Mr. Trafton.

(Witness excused.)

Mr. Stevens: May we take the evening recess, your Honor?

The Court: It is nearly five. Any objections?

Mr. Taylor: Absolutely not, your Honor.

The Court: Members of the jury, once again it is my duty to admonish you not to discuss the subject of this trial with any person; do not permit any person to discuss it with you; do not listen to any conversation concerning the subject of the trial;

and do not form or express any opinion until the case is finally submitted to you. You are excused until ten o'clock tomorrow morning. [322]

The Clerk: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 4:55 p.m., the trial of this cause was adjourned until May 20, 1955, at 10:00 a.m.)

May 20, 1955—10:00 A.M.

Be It Remembered, that upon the 20th day of May, 1955, at the hour of 10 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Clerk: Court is now in session.

The Court: Let the record show the presence of the defendant and his counsel; the government attorneys. Will the Clerk, please, call the roll of the jury and the alternates?

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Very well. The defendant ready to proceed?

Mr. Taylor: The defendant is ready, your Honor.

The Court: The government?

Mr. Stevens: The government is ready, your Honor. Your Honor, we would move the admission

of this Government's Identification 18, which is the book that corresponds, has the number which corresponds to the two exhibits that are in [313] evidence at this time, Government's Exhibit H and I have the same number. It is to tie into, to show that there was proper identification.

Mr. Taylor: We will stipulate, your Honor, without the introduction of the book.

The Court: Will you repeat that, Mr. Taylor?

Mr. Taylor: I say I will stipulate that they have that identification number of the cleaners on those two garments without bothering about introducing the book.

Mr. Stevens: The book goes a little further, showed the identity of the customer which is connected with the number, being Curly Urban. If Mr. Taylor would stipulate that this book shows that No. 18777 was an item sent in by Curly Urban or items of clothing sent in by Curly Urban we would appreciate it.

Mr. Taylor: We will stipulate to that.

The Court: Very well, so stipulated.

Mr. Stevens: Thank you, your Honor. May we withdraw that exhibit then due to the stipulation?

The Court: Any objection?

Mr. Taylor: No objection.

Mr. Stevens: Call Mr. Mayfield, please.

E. L. MAYFIELD

a witness called in behalf of the plaintiff, was duly sworn and testified as follows: [324]

Direct Examination

By Mr. Stevens:

Q. Would you state your name for us, please?

A. E. L. Mayfield.

Mr. Miller: Beg pardon, sir.

Mr. Mayfield: E. L. Mayfield.

Q. (By Mr. Stevens): What is your occupation, Mr. Mayfield?

A. I am in the employ of the Department of Territorial Police.

Q. Where do you live? A. In Anchorage.

Q. In January of, in the early part of February of this year where were you stationed?

A. I was working in Fairbanks at that time.

Q. And was that for the Territorial Police?

A. Yes, sir.

Q. While you were here as a Territorial Policeman, Mr. Mayfield, did you come in contact with Mr. Urban, the defendant in this case?

A. Yes, I did.

Q. Do you recall when that was?

A. It was February the 4th, about ten forty-five in the evening.

Q. And where was that? [325]

A. In the Territorial Police Office here in Fairbanks.

Q. Was there anyone, anyone with you at that time?

(Testimony of E. L. Mayfield.)

A. Yes, Officer Goodfellow of the Department of Territorial Police and Officer Wirth working for the Fairbanks police.

Q. Did you have a conversation at that time with Mr. Urban? A. Yes, we do.

Q. Was this conversation prefaced with any type of statement to Mr. Urban concerning whether or not he had to make a statement to you?

A. Yes, he, when he came into the office I asked him if he wanted to discuss this case with me and he said that he did.

Mr. Stevens: The planes are giving us a bad time.

Mr. Taylor: Just wait until that noise calms down, will you?

Mr. Mayfield: O. K.

Q. (By Mr. Stevens): Now, will you continue, please?

A. We asked him if he would like to discuss this case with us and he said that he did.

Q. And was Mr. Urban under any restraint at that time? A. No, he was not.

Q. He was not under any arrest or anything like that? A. No. [326]

Q. Will you tell us what the conversation at that time was?

A. Yes. I personally advised him or rather asked him if he would like to discuss this case and he said he would. I told him he didn't have to if he didn't want to because anything that he may say could be used against him and he said no, that he

(Testimony of E. L. Mayfield.)

wanted to discuss the case in its entirety. He advised us that on the morning of January 21st between five and seven a.m., he had gone to the Players Club at Fairbanks to get the girl that was living with him by the name of Cathey, and she didn't want to come back to the club with him so he said he took her by the arm and put her in the cab and took her back out to the Alibi Club where they had been staying. He advised that they had been staying together since last September or October. He stated at that time that when she had moved in with him that she was without funds and he had paid her——

Mr. Taylor: Just a moment, please.

Mr. Stevens: Go ahead.

Mr. Taylor: Start that statement over, will you?

Mr. Mayfield: In its entirety?

Mr. Taylor: No, just that last part.

Mr. Mayfield: When she had moved in with him last October, September or October, she was without funds.

Mr. Stevens: Your Honor, the testimony of Mr. Mayfield [327] is not going to take too long. Could we close all these windows for this time?

The Court: We can certainly close the windows on this wall.

Mr. Stevens: I think the record should show that these interruptions are coming from extraneous noises from outside.

Mr. Mayfield: Mr. Urban advised he had gone down to this downtown rooming house or hotel and

(Testimony of E. L. Mayfield.)

paid her back room or what money she owed. He advised us that he had promised her half-interest in the club if she would stay there and work with him and he had said that she had lived in the Alibi Club along with him during this time; said when they came in out of the cab this morning of January 21st that they went to the bar and had a drink and while they were drinking she fell off the stool and hit her head on the floor and made the remark that it sounded like a cannon. So he got a towel and cleaned her up and put her to bed. She wanted something to eat but he only gave her some fruit juices and put her, no, I take that back. When they came in, had that drink, she said that she was going back out that night, that morning, and he said no, you are not, so she slammed the door and left. He didn't see her, he said again until Saturday morning between seven and eight o'clock and when she came in and at that time she was all beat up and was covered with blood. He said she was wearing brown slacks [328] and a red coat and she wanted Mr. Urban to buy her a drink, so they went to the bar and had the drink and that is when she fell off the stool and her head hit the floor and he made the remark that it sounded like a cannon and that was when he had got a towel and cleaned her up and put her to bed and gave her some orange juice. He had asked her, he told us he had asked her at that time who beat her up and she advised that she would fight her own battles. He asked if he couldn't take her to a doctor or call one and she said no.

(Testimony of E. L. Mayfield.)

She refused, but about, he said about between seven and eight o'clock Saturday evening he did call a doctor and had a doctor come out to the Alibi Club to sew up her lip and the doctor had asked her then who had beat her up and she said that she would fight her own battles. He said that he didn't keep the club open during her recuperation. She would be up from time to time attempting to cook some meals but he would prepare fruit juices and see that she had something to eat. He said he did go to town from time to time to get some fruit juices and milk for her, said on January the 30th in the evening she was up attempting to get a typewriter or had a typewriter and fallen and advised him that she had hurt her back and asked if he wouldn't rub her back. He said that while he was rubbing her back something snapped and she advised him that her fingers were getting numb so he called an ambulance and an ambulance came and took her to the hospital in Fairbanks and at the hospital again he asked [329] who had done it and she said that she would take care of it. Either myself or Mr. Wirth asked him at the time if he was not the one that had beat up Cathey and he said, no, and that he could prove it. I asked Mr. Urban if he would like to prove it and talk to a polygraph or a lie detector and he said no, that he would not talk to a lie detector until such time as he had consulted his attorney. Mr. Urban was in the office where we had our discussion for about an hour and a half

(Testimony of E. L. Mayfield.)

when he left with Officer Wirth of the Police Department.

Q. (By Mr. Stevens): Was this a signed statement? A. No.

Q. Did you take any notes of your own?

A. Yes, I did.

Mr. Stevens: Thank you very much, Mr. Mayfield. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. How long have you been with the Territorial Police, Mr. Mayfield?

A. Well, since they started about a year and a half ago, Territorial Police.

Q. And prior to that you was with what they called the Alaska Highway Patrol?

A. Yes, sir. [330]

Q. And what was the duration of your entire services with the Territory as a police officer?

A. I believe April, 1947, I started.

Q. About eight years then, a little better than eight years you have been on the force?

A. Yes, sir.

Q. Now, at the time that you asked Mr. Urban if he would take a polygraph test did you have a polygraph machine at the Territorial Headquarters?

A. No, sir.

Q. Now, did you consult your notes, Mr. Mayfield, before you came to testify at this time?

(Testimony of E. L. Mayfield.)

A. Yes, sir.

Q. How long previous to testifying?

A. I consulted them just before coming into the court room.

Q. And how long did you go over those notes, how long did you spend on them, you might call refreshing your memory?

A. Oh, about thirty minutes, I imagine.

Q. Now, how does it happen to be that Mr. Urban was at the Territorial Police Office on February the 4th?

A. Officers Wirth and Officer Goodfellow and he were in the office when I came in.

Q. You don't know how he happened to be brought there then? [331]

A. They had asked me if I would like to sit in and discuss this matter with them.

Q. Was that before they went up to the Alibi Club and got him or before, or after they had brought him down there?

A. I don't believe they advised me until such time they had contacted Mr. Urban. I am not sure.

Q. And you stated that all you did was ask him if he wished to make a statement about the case, is that right?

A. I asked him that, yes.

Q. And he had no hesitation about making a statement in the case?

A. No, sir.

Q. Now, you say Officer Goodfellow and Mr. Wirth of the city police were there?

A. Yes, sir.

Q. Now, you say that was on January the 21st

(Testimony of E. L. Mayfield.)

that Mr., that the, that Mr. Urban said he had gone to the Players Club? A. Yes, sir.

Q. Are you sure that it was not the 22nd?

A. My notes reflected it was the morning of January the 21st.

Q. If Sergeant Wirth and Mr. Goodfellow both advised it was the 22nd wouldn't you say they were wrong?

A. I can only testify from what my notes reveal. [332]

Q. Not from your memory then?

A. No, I couldn't.

Q. Not from your memory?

A. I couldn't remember that long, no.

Q. I see. Now, how long did he say he had been at the Players Club? A. He didn't state.

Q. Did he make any particular reference to any acts that took place there or anything that he had done?

A. Yes, I just stated that he had gone there to take Cathey home with him and said that she refused to go or said she didn't want to go and he had taken her by the arm and they got a cab and went out to the Alibi.

Q. Did he tell you that Miss Cathey had called him from the Players Club to come and get her?

A. I don't recall he had told her that.

Q. Did your notes reflect that? A. No.

Q. And did he say how long he had been at the Players Club? A. No.

Q. Did you ask him? A. I don't recall.

(Testimony of E. L. Mayfield.)

Q. And did he say anything to you about buying a drink or two at the Players Club? [333]

A. Not that I recall.

Q. Well, you remember whether Mr. Wirth or Goodfellow asked him those questions while you were there?

A. If they did I didn't put them in my notes?

Q. Now, in your questioning, Mr. Mayfield, just what was you trying to ascertain; was you trying to get what happened that morning, what he had done between the time he went to the Players Club?

A. He advised us that he wanted to tell us the entire incident that led us to this Cathey's death and it was a voluntary statement as far as we were concerned.

Q. Did you interpose any questions to Mr. Urban?

A. Probably from time to time we had asked some.

Q. So far as you remember you didn't interpose any questions as to what happened in the Players Club?

A. I don't recall.

Q. And then what time did he say that he and Miss Cathey went back to the Alibi Club?

A. From the Players Club?

Q. Yes.

A. He said that he had called at the Players Club between five and seven a.m.

Q. And I don't believe you quite got your answer that time. You say what between five and seven? [334]

(Testimony of E. L. Mayfield.)

A. He said he had called at the Players Club between five and seven a.m. to take her home.

Q. And then I believe you also stated something about when he took her home that she sat down at the bar and fell off the stool?

A. Yes, I did. I made a correction on that. I would, they had a drink and then she said she was going to leave and that is when she left and slammed the door.

Q. She did not then, he didn't say she sat down on the stool when they went in from after getting, arriving back from the Players Club?

A. They may have set on the stool to have that drink before she left.

Q. There was nobody fell off any stool at that time?

A. He didn't state there was.

Q. Your memory played tricks on you, did it?

A. When she fell off the stool was when she had come back Saturday morning.

Q. Now, what date was Saturday night?

A. January 22nd.

Q. And then what time did Mr. Urban say that you, or say that she had come back to the Alibi Club?

A. It was Saturday morning between seven and eight.

Q. Saturday morning between seven and eight o'clock? [335]

A. Yes.

Q. Was that the time that she left the Alibi Club after coming back from the Players?

A. She had left the Alibi Club Friday morning and came back Saturday morning.

(Testimony of E. L. Mayfield.)

Q. What date was Friday morning?

A. January the 21st.

Q. Would you like to consult you notes a little bit, Mr. Mayfield, to see how close you are in your testimony?

A. If I may.

Q. What?

A. If I may.

Q. Well, wait, I will go a little farther with this, so then he told you that she came back then between seven and eight o'clock on Saturday morning, is that right?

A. Yes, sir.

Q. Now, if Mr. Goodfellow testified that she came back at two o'clock, afternoon of the 21st or 22nd, would you think Mr. Goodfellow would be testifying to something different than you?

A. I can only testify to what my notes reveal.

Q. No, you are testifying as to what Mr. Urban told you, are you not?

A. I am testifying what I jotted down at the time Mr. Urban and I had our discussion. [336]

Q. And if Mr. Goodfellow in testifying to the same conversation——

Mr. Stevens: I object to that. Mr. Goodfellow did not testify to the same conversation, misstating the evidence.

Q. (By Mr. Taylor): Mr. Mayfield, if Mr. Goodfellow was testifying to the same conversation and said she came back at two o'clock in the afternoon, would you say that his testimony was wrong?

Mr. Stevens: I object to that and ask that the question be stricken on the ground that it is mis-

(Testimony of E. L. Mayfield.)

stating the evidence. Mr. Goodfellow did not testify concerning the conversation which took place at the Territorial Police office. Mr. Wirth touched upon it, but Mr. Goodfellow testified concerning a conversation with Mr. Urban at the Alibi Club on the evening of February 4th.

The Court: Objection sustained.

Mr. Taylor. If the Court please, I would like to have that testimony before the Court sustains that objection because I am positive in my own mind that Mr. Goodfellow of the Alaska Police testified to conversation at the police headquarters and also a conversation at the Alibi Club. Mr. Wirth also testified to the conversation.

Mr. Stevens: I am not challenging Mr. Taylor's memory, but he has got the police headquarters mixed up. Mr. [337] Goodfellow testified concerning a conversation at the Fairbanks City Police headquarters and later that was on the morning of the 31st day of January, 1955, and he later testified concerning a conversation on the evening of the 4th day of February, 1955, at the Alibi Club.

The Court: That is what my notes reflect as Mr. Stevens' statement, but if Mr. Taylor wishes to go through the testimony with the reporter I wish to give him an opportunity to do so.

Mr. Taylor: Well, our notes show, your Honor, that the testimony was, but I will ask him another question about the same matter first and maybe we will go back and get the records later on.

The Court: Very well.

(Testimony of E. L. Mayfield.)

Q. (By Mr. Taylor): Mr. Mayfield, if Sergeant Wirth testified here as to a conversation that he had with Mr. Urban at the police headquarters in your presence on the 4th day of February, 1955, and Mr. Wirth testified that Miss Cathey, Mr. Urban had said that Miss Cathey returned to the Alibi Club at three o'clock in the afternoon of the 22nd of January, 1955, would you say that Sergeant Wirth was wrong?

A. Well, I can only testify as to what my notes reveal.

Q. Oh, you are not testifying from your memory then of the conversation between you then? [338]

A. In a sense it would be because I jotted down what he had told me on my notes and I had to refresh my memory. Naturally, I couldn't remember those dates and times.

Q. Well, now, would you answer the question though, which would be right, your testimony now as to what the conversation was or Sergeant Wirth's testimony as to what the conversation was?

A. I didn't understand your question.

Q. You testified that she returned at seven or eight o'clock in the morning to the Alibi Club?

A. That is what Mr. Urban——

Q. Sergeant Wirth says that Mr. Urban says at the same conversation that she returned at three o'clock in the afternoon of the 22nd?

A. My testimony is that Mr. Urban had advised us that she had returned between seven and eight o'clock on Saturday morning.

(Testimony of E. L. Mayfield.)

Q. Now, Mr. Mayfield, isn't it a fact that you have got that just turned around, that she left at seven or eight o'clock in the morning and returned at two o'clock that afternoon, or three o'clock?

A. No, no, I'm not.

Q. What? A. No, sir.

Q. Well Sergeant Wirth then was incorrect in his [339] testimony if he testified to that effect?

A. I can't tell you anything about his testimony.

Q. You what?

A. I couldn't state anything about his testimony.

Q. Well, you say that your testimony, is it correct testimony?

A. When Mr. Urban was giving us the information I was jotting it down and in rereading this morning I testified exactly what my notes reveal.

Q. Well, so then, if your testimony was the testimony you took was jotted down at that time and Mr. Wirth testified to entirely different statement by Mr. Wirth, evidently then Sergeant Wirth is wrong or Mr. Urban I mean, Sergeant Wirth is wrong?

Mr. Stevens: I believe that it is argumentative and again if Mr. Taylor wishes to pursue this perhaps we should read over the testimony because Mr. Wirth and Mr. Goodfellow testified concerning two specific conversations. These are separate conversations. One at the police station, another at the Alibi. This is a third one at the Territorial Police station.

(Testimony of E. L. Mayfield.)

The Court: I don't think the proper foundation has been laid to show this is the identical conversation or statement of the defendant. The witness hasn't said that while he made his notes and took the statement that Mr. Goodfellow was [340] present at all times.

Mr. Taylor: Oh, yes, your Honor, the testimony was that Mr. Mayfield, Sergeant Goodfellow and Sergeant Wirth were all present at that time.

The Court: I wish to give counsel an opportunity to go over the testimony to be certain of this point.

Mr. Taylor: Well, your Honor, I didn't put this testimony in. The government brought it in and there was such discrepancy in it I want to get it straightened around, see how it came about. This is the first time it crept into the evidence here that she came home at seven or eight o'clock in the morning.

The Court: I will give counsel an opportunity to go into the transcript so we will know what we are doing here.

Mr. Taylor: Go into what, your Honor?

The Court: The transcript.

Mr. Taylor: Yes, sir.

The Court: So, members of the jury, to know what has developed and we want the matters to be as accurate as possible at this time I am going to declare a recess and I once more admonish you not to discuss this case with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject of the trial; do

(Testimony of E. L. Mayfield.)

not form or express any opinion until the case is finally submitted to you. We will take a ten minute recess. [341]

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:00 a.m., the Court took a recess until 11:10 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record, please, show the presence of the defendant and his counsel, and the government attorneys.

Mr. Taylor: We will stipulate the jury is all present.

Mr. Stevens: We will also stipulate, your Honor.

The Court: Very well. Proceed.

E. L. MAYFIELD

the witness under examination at the time the recess was taken, resumed the stand for further cross-examination.

By Mr. Taylor:

Q. Mr. Mayfield, during the recess did you consult your notes? A. No, sir.

Q. Oh, you didn't, you didn't look them over. Now, just one question then, your testimony that you have given on direct and cross-examination, was that from your memory or was it from your notes?

A. I read my notes this morning as I have testified that I had, oh, about thirty minutes prior to entering the court room. [342]

(Testimony of E. L. Mayfield.)

Q. And before you read the notes this morning, did you have a clear memory of what had transpired on February the 4th?

A. With the exception of the exact dates and times.

Mr. Taylor: That's all.

Redirect Examination

By Mr. Stevens:

Q. You are testifying from your memory as refreshed by your examination of your notes this morning, is that it? A. Yes, sir.

Mr. Stevens: Just a minute, your Honor. There has been this delay and I am not sure what was covered on cross-examination now.

The Court: Very well.

Q. (By Mr. Stevens): Were you a witness at the Alibi Club, Mr. Mayfield, when the conversation with Mr. Goodfellow and Mr. Wirth related here took place? A. No, sir.

Mr. Stevens: No further questions.

Mr. Taylor: That's all.

The Court: That's all, Mr. Mayfield.

Mr. Mayfield: Thank you.

(Witness excused.)

Mr. Stevens: Mr. Hall, are there any of the government identifications that have not been admitted that are still [343] in the form of being offered? That was not offered at this time. It was overruled.

The Clerk: That is all there are, sir. The five

pictures were withdrawn. The taxi record, the parka and the sweater are in, and the pair of dark gray slacks and the pair of just gray slacks are not in and didn't get in.

Mr. Stevens: We now withdraw those identifications, your Honor, on the ground that we could not identify them sufficiently.

The Court: Any objection?

Mr. Taylor: No objection.

The Court: They may be withdrawn.

The Clerk: That is all there are, sir.

Mr. Stevens: The government rests at this time, your Honor.

The Court: The government having rested, is the defendant ready to proceed?

Mr. Miller: If the Court please, as I have previously notified the Court when Mr. Stevens notified us last night that this was going to be his last witness and we prepared for an, or attempted to prepare for a motion but due to the fact that we have only the one set of books in our library and this case is hinged on certain cases Mr. Stevens also looking at some of those cases, there were several of the books that we couldn't get. For that reason, I would like the Court to give us some [344] time to check those books, check those particular cases before we make our motion and we would like to make a motion out of the hearing of the jury.

The Court: How much time would you like, Mr. Miller?

Mr. Miller: Well, due to the fact that we worked through lunch yesterday I would sort of request

that we don't have to work through it again today. I would like to have, to make the motion until three o'clock. Would that be all right with the Court? There are about eight or ten cases that I have that I do not have the books on and by checking those and checking the cases that will be referred to we will probably bring around twenty-five or thirty cases that would have to be checked into.

The Court: I don't want to rush counsel either for the defense or for the government, and if I were to grant that request until three o'clock I presume that argument would take some time in view of the statement of counsel. I am thinking of the jury. This is Friday. Tomorrow is Saturday and Armed Forces Day.

Mr. Miller: I understand, too, Mr. Stevens has another simple matter to argue tomorrow. I take it by the Court's statement that you are considering releasing the jury until Monday morning. is that what you——

The Court: I was wondering whether that would be advisable. [345]

Mr. Miller: That will be satisfactory with us, your Honor. The reason that I asked until three was because I didn't want to work during lunch and I certainly plan to stay at it steady, and the extra two hours would be of benefit and the research and have the hearing say at four o'clock instead of three.

The Court: Does the government have any objection to releasing the jury until Monday morning with the proper admonition?

Mr. Stevens: We can't see that we would have

any valid objection. We have an objection, but it is the objection to the loss of continuity of the trial. But I believe the statement of counsel is correct. I have had the majority of these books and he has not been able to see them. We would be willing to agree that the testimony begin again at ten o'clock Monday morning and dispose of this motion this afternoon. We intend to dispose of the motion this afternoon?

The Court: That is what I understand. It will take some time to present it. The afternoon will be pretty well gone by the time, and the Court doesn't like to break the continuity of a trial either, but we are caught in these circumstances. There being no objection on the part of the defendant or the government we will do that, and so members of the jury, once again it is my duty to admonish you and of course, it is your serious duty not to discuss the subject matter of [346] this trial with anybody; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion thereon until the case is finally submitted to you. And you are excused until ten o'clock Monday morning.

The Court then will hear the defendant's motion at three o'clock and the Court will recess until 1:30.

The Clerk: Court is recessed until 1:30.

(Thereupon, at 11:20 a.m., the trial of this cause was recessed until 3:00 p.m., at which time the Court reconvened and the trial of this cause was resumed.)

No. 14883

United States
Court of Appeals
for the Ninth Circuit

LEON D. URBAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 337 to 702)

Appeal from the District Court
for the District of Alaska,
Fourth Division

FILED

MAR - 2 1956

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.-2-20-56

PAUL P. O'BRIEN, CLERK

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The Clerk: Court is reconvened.

Mr. Stevens: I will see if counsel is here.

The Clerk: Your Honor, Mr. Taylor's office says they are on their way over here, sir.

The Court: Mr. Stevens, I didn't realize until a few minutes ago that we have a case fixed for tomorrow, a civil case.

Mr. Stevens: Yes, sir.

The Court: And Mr. Johnson, I believe, is the attorney involved other than you?

Mr. Stevens: That is correct.

The Court: It is Armed Forces Day and a review of the troops tomorrow and I was wondering if we could start at nine and go from nine until eleven, or how long do you think [347] that case is going to take.

Mr. Stevens: That case is going to be submitted on what approximates an agreed state of facts. The arguments will be on law. I would be under the impression that the case could be submitted on briefs. If we could have a short term at nine on the admission of stipulated evidence. We would be very willing to start at nine because we intend to join in the parade, too.

The Court: Well, maybe Mrs. Wann could call Mr. Johnson. Would you think it would be satisfactory to start at nine and we would be through in plenty of time? See if that is agreeable with Mr. Johnson. Mrs. Wann informs me that nine o'clock is agreeable with Mr. Johnson.

Mr. Stevens: Fine, your Honor. The Court might

want to read the previous decision in the Patton case on appeal.

The Court: Has that been cited or not?

Mr. Stevens: It should be in the file, your Honor, as the case went up on an appeal from——

The Court: Oh, you mean in this case it went up and back again?

Mr. Stevens: Yes, your Honor.

The Court: Oh, I want to read that.

Mr. Taylor: Sorry, your Honor. I got held up.

The Court: Do you wish to wait for Mr. Miller, Mr. Taylor? [348]

Mr. Taylor: Mr. Miller has got some work over there and I told him I would take care of this.

The Court: Very well. Let the record show the presence of the defendant and his counsel, Mr. Taylor; the government attorney, Mr. Stevens.

Mr. Stevens: Before Mr. Taylor begins, your Honor, I wonder if the Court would permit us to state into the record and have Mr. Taylor agree with us that the identifications which are the, or the exhibits which are the large pictures, the enlarged pictures have not been shown to the jury as yet although they have been admitted in evidence. We have been very careful not to demonstrate those to the jury until the close of our evidence and I believe Mr. Taylor would agree with that.

Mr. Taylor: I am not going to agree with that, your Honor, because so far as I know the pictures have never been put in evidence, the big pictures.

Mr. Stevens: Well——

Mr. Taylor: I say I am not aware of it and I

was waiting for them to be, attempt to be introduced because I was going to object to them, your Honor, and I am still objecting to them because if they were put in they were put in without my knowledge.

The Court: I understood they were in, put in over and above your objection, if I recall it. [349]

Mr. Stevens: The objection is in the record. What we want is an agreement that we have not shown those pictures to the jury prior to the close of our case. I believe that is a correct statement.

Mr. Taylor: Your Honor, I objected to the pictures taken out at the Alibi Club. I have no objections to the contact pictures, the ones taken from the film. I have some law on the introduction of the blown-up pictures that I thought when it came up yesterday that the only ones that went in was the small pictures which I can't see any use for.

The Court: That would be a matter of record, but what Mr. Stevens is attempting to do at this time is to see if counsel will stipulate that the large enlarged photos, whether they have been in evidence or not, have not been shown to the jury. That is what he is interested in.

Mr. Taylor: Oh, I know they haven't been shown to the jury. Yes, your Honor.

Mr. Stevens: Thank you, Mr. Taylor.

Mr. Taylor: I would certainly at this time move, if they have been introduced in evidence, I would at this time move that they be withdrawn and stricken as incompetent, irrelevant and immaterial; and highly prejudicial to this defendant. They unduly accentuate, according to the photographer, the

bruises and contusions and would probably cause prejudice and I was waiting for them to be offered, your Honor, so I could [350] make proper objections to them going in.

The Court: Well, the Court's memory of that is somewhat different, but as I say, that is a matter of record.

Mr. Stevens: Thank you.

The Court: Now, Mr. Taylor, I understand that the government having rested and in the absence of the jury, the defendant wishes to make a motion.

Mr. Taylor: Yes, your Honor.

The Court: And what will that motion be?

Mr. Taylor: Well, my first motion, your Honor, is a, on behalf of the defendant and we move that the Court, for an order entering a judgment of acquittal of the crime of murder in the first degree as charged in the indictment upon the grounds that there has been a total failure to prove the essential elements of the crime charged, to wit, that the defendant purposely or with deliberated and premeditated malice or by means of poisoning or perpetrating or attempting to perpetrate a felony killed Myrtle Cathey.

And we make the further motion, your Honor, of a judgment for acquittal of this defendant and ask for an order entering a judgment of acquittal of the crime of murder in the second degree as an included crime in the indictment herein on the grounds that there has been a total failure of proof of the essential elements of murder in the second degree, to wit, that

the defendant purposely and maliciously killed Myrtle Cathey. [351]

We make a further motion, your Honor, that the defendant move the Court for the Court entering a judgment of acquittal for the crime of manslaughter as an included offense in the indictment herein upon the grounds that there has been a total failure of proof of the unlawful killing of Myrtle Cathey by the defendant.

And in support of those motions, your Honor, I have considerable law I would like to call to the Court's attention. Law which is, I think has been enthralling in this particular case especially in view of the fact that the cited cases were all in which the defendant has shown a more or less malignant heart and was intent upon inflicting further violence upon the deceased.

Now, we have the case of *McAndrews v. State*——

The Court: Your authorities you offer in support of the three motions, is that right?

Mr. Taylor: Most of these, your Honor, cases going to the first and second motions, both which require premeditation and malice and intent and now case of *McAndrews v. State*, that is a case set forth in 24 American Law Reports, 656. That is the main case.

The Court: That page again, please, 24 A.L.R.?

Mr. Taylor: Yeah, 24 A.L.R., 656, and that is also 208 Pacific 486. Now, in that case, if the Court please, the [352] Supreme Court of the State of Colorado held that malice aforethought either ex-

press or implied must appear from the evidence in order to warrant a conviction for any degree of murder. Now, and the Court also held with approval the case of *Commonwealth v. Fox*. That was a Massachusetts case, 7 Gray 585, and in practically all cases concerning a type of case of this, in which there has been no evidence of malice or intention or premeditation, the *Commonwealth v. Fox* is cited as one of the leading cases. Now, the Supreme Court of Massachusetts in that case said if the death should ensue from an attack made with hands and feet only, on a person of mature years, in full health and strength, the law will not imply malice because ordinarily death would not be caused by the use of such means.

I think the Court arrived at that decision out of the thousands, or hundreds of thousands of cases in which physical violence is inflicted by the hands and the feet death very, very rarely occurs. If it does occur, it is possibly by some reason of an unknown weakness or failure of the party charged such as a case I knew one time, two boys were having a fight. I was there. One hit the other and he fell back and died, killed. And it was found that the, that this one boy he played with had a paper thin skull, very thin skull and with the ordinary skull would have withstood the blow.

And in that there is a number of cases in Illinois, *People v. Mighell*, 98 Northeastern at 236; *People v. Lurie*, [353] 115 Northeastern 130; *People v. Pileski*, 128 Northeastern at 801. And the Supreme Court of Illinois in each of those cases they held that malice or intent cannot be implied where the

homicide is committed by means not likely to produce death and in *Crenshaw v. People*, which is 131 Northeast at 576, which is another leading case, your Honor, and I think that appears in Volume 15 of A.L.R. and I don't remember whether I got, I know it is 15 A.L.R., but I am trying to find the page number. And they stated that no inference of an intent to kill is warranted from the striking of a person on the head with the fist, although death results, so as to constitute murder.

Now, your Honor, in this case, if we analyze the evidence that has been produced so far we have no evidence of any intent whatsoever on the part of the defendant to bring about the death of Myrtle Cathey. In fact, your Honor, that there is no evidence of this defendant striking Myrtle Cathey in such a manner as to inflict even minor wounds or contusions. All the testimony in this case, your Honor, is based upon the testimony, or on the evidence of highway patrolmen, city policemen, as to what this defendant said. They offer that evidence, your Honor, and that evidence is indicative of innocence. It shows no intent to kill. It shows that there was no assault upon Cathey. It does not show a malignant heart or an evil disposition to do harm to her. Your Honor, it shows just exactly the opposite. It showed a desire to shield her from [354] these things and that when this, when the deceased returned home, his whole efforts for a period of nine days thereafter, your Honor, was given to the aid and help of this girl. He called a doctor when she refused to go to the hospital. He called a cab to take

her to the hospital and she says, no, she was not going, and the testimony of the officers is here that when they tried to find out or when they, when Mr. Urban tried to find out who had beat her and struck her and put her in that condition she said she would settle her own beefs herself.

Now, she didn't go to the hospital the first time so Mr. Urban had a doctor come and he examined her and he sewed up her lips, which had received some cuts, and from thereafter, Mr. Urban done the greater part of the cooking although later the deceased was able to get up and about, answered the phone in connection with his business as dealing in surplus property and showed a very marked improvement in her health until the 31st day of January, 1955; that on that date Mr. Urban had brought home some hamburger and she had cooked a hamburger with gravy and he ate along late in the afternoon.

Mr. Stevens: Where is that in the evidence, your Honor?

The Court: I don't know.

Mr. Taylor: And then along in the evening she became ill. It was an illness that alarmed the defendant and he immediately called the doctor and after the doctor arrived [355] he called the ambulance and they took her to the hospital and he went along. And he stayed there until after the death of the deceased at possibly one-thirty in the morning.

Now, the doctor came to the house or came to the Alibi Club and into the apartment or the bedroom which is off of the dance hall at the Alibi Club and

the doctor evidently was alarmed at her, at the extent of her illness and he ordered her to the hospital and that is how she happened to go over there. Immediately following her death Mr. Urban went to the police station to give the officers the address of her folks and done everything he could. He cooperated with the authorities and gave them the true state of facts. He had promised Miss Cathey at one time that he would tell one story, that was before she died for a particular reason. After she died why Mr. Urban was relieved from that promise and he told the officers what the true state of facts were. And to that, to this day he has cooperated. He has not tried to evade in anyway his duties toward the people or towards Miss Cathey.

Now, we have the testimony of a cab driver, a Mr. Jennings who appeared here. That is the only testimony, your Honor, of a blow being struck by Mr. Urban on Miss Cathey, and under the circumstances, improbability, your Honor, of that story should be apparent to the Court: I know it was apparent to the spectators and it was very apparent to myself. Now, [356] either this cab driver has Mr. Urban bringing out this lady from the Players Club which was, which was located on Gaffney Way. She was quite intoxicated. In fact, intoxicated to such an extent that the cab driver had to help Mr. Urban to get her across the seat to the left-hand side of the cab. In getting over there she bumped her head over against the wall, against the side of the cab. Now, the cab driver pulled out. He said it was dark

at the time, and I think we can take judicial notice that it was dark, the fact that it was around four-thirty in the morning on January of 1955. And that he drove to the Alibi Club approximately a mile from the Players Club. He says it took five minutes to drive that mile and if that is the time that he took, your Honor, I think it is the slowest taxi trip that anybody has ever had in the town of Fairbanks at four-thirty in the morning when there is no traffic that he had to take five minutes to drive one mile. And during that mile, and then he finally got it down and he said, well, maybe it was three minutes, but in that time while the cab was going this mile Mr. Urban evidently for some reason we know nothing about, had shoved Miss Cathey down on the floor, although it took two men to slide her across the seat. Mr. Jennings has Mr. Urban, Miss Cathey back up on the seat before they got out to their destination, got her up there and then slapped her a couple of times. He said he slapped her. He said he [357] heard something but he said he didn't see a thing. Now, your Honor, I believe that evidence is of such a nature that the Court cannot seriously consider Jennings' testimony.

Now that is the only testimony of any force of any kind or nature that was exerted toward Miss Cathey by Mr. Urban. The only testimony, and then Jennings said when he got out of the car this man dragged her by her hair to the door of the Alibi Club. If the Court please, we know that if Miss Cathey weighed one hundred sixty pounds and was dragged by the hair of her head out of that cab and over to

the door of that Alibi Club, there would have been considerable hair missing from her head or her head would have been in such an inflamed, blood clotted condition from the pull that had been exerted on the head that it would have certainly been noticeable to the doctor who testified that he made an examination of the entire skull, the outer part of the skull and that there was no marks of any violence on the head but still this man had dragged a hundred sixty pound woman out of the cab and dragged her across over to the door of the Alibi Club and still at that didn't muss her hair up, your Honor. That is about the most preposterous statement I have heard in this courtroom for a long time. A man testified to those particular matters.

Now, our first concern, your Honor, is to boil this case down to its essential elements, eliminate those which are [358] not necessary here and first, the fact that the, that our judgment for acquittal of the crime of murder in the first degree should be, or that is the judgment of acquittal should be entered herein as under the law and the evidence there is no proof whatsoever of malice or intent or any premeditation which is so essential to the proof of murder in the first degree.

Now, in the, as to the second degree, your Honor, we feel that should likewise be, judgment of acquittal should be entered upon the ground that there is no malice or no intent which are essential to prove murder in the second degree.

Now the only thing that Mr. Stevens said you are going to prove malice was the fact that he got an

old man, I think he was about half-baked from the way he testified to, said he was the iceman, said he walked in there one time and he went up to the bar. Miss Cathey was sitting there and he struck her. Well, now, did he strike her? Oh, he back-handed her. She went off the stool, but got up, come around and set on the other side of Mr. Urban. And that happened a month before this supposed crime happened and that is the sole incident that they are basing their malice on. There was no malice. There was no hard feelings. Miss Cathey was not frightened. She got up, come right around, set on the stool along side of him so there we have no intent, no malice to prove it; no malice or intent proved to substantiate the charge of murder in the second degree which is included in the indictment. [359]

Now, your Honor, and I think that those are the things that the Supreme Court and the Courts of the United States have held are necessary to prove, any of those should be proved if you are going to show that only hands were used in an attack; that you cannot prove malice nor can you prove intent by the fact that only those means of injury were used. The cases, your Honor, are universal. I have not found a dissenting case; except in the cases where a man beat a person for forty minutes unmercifully beat them until he died they had never ceased, they said that principal of law did not apply because it did show a malignant heart. It showed an evil disposition, and that the person was intent upon killing and, your Honor, in this case of *McAndrews*, *People v. McAndrews*, which is a Colorado case,

in that case there was an unprovoked attack upon a man of fifty-five, fifty-six years old by a younger person and it continued quite some time, but the Supreme Court said they were not going to establish a long-time precedent and say that a person using only their hands in an attack could be judged guilty of first or second degree murder, and the most it could be would be involuntary manslaughter because they were using a means of violence, your Honor, which in thousands, hundreds of thousands of cases only produced minor injuries or maybe more or less major injuries but never any contemplation of death from them. Now that principal, your Honor, applies here so we have no malice; we have no [360] intent; because we don't even know, your Honor, whether the hands were used here. We know there was no weapon used. They haven't shown a thing what weapon was used. So we feel, your Honor, that the first, that the first degree and the second degree should certainly be throwed out; that this verdict of acquittal should be made in this case.

Now, your Honor, there was one case I would like to call the Court's attention to, and that is the case of *Thomas v. Commonwealth*, 86 Southwestern, 694. In that case a man threatened to kill a woman that he was living with, and he hit her with his fists and knocked her down; he kicked her in the stomach; he kicked her in the face; he kicked her in the head; and from that kicking and that striking with his fists the woman died. He was convicted but the Supreme Court of Kentucky reversed it and remanded it for the reason that the Court did not give the

proper instructions in the case and they set out the instruction that should be given, your Honor, and that instruction has been quoted in a number of these other cases as the instruction that should be given in cases of this type where only the hands and feet are used in an attack. Said the Court should have instructed the jury as follows: "In this case the injuries were inflicted by the hands and feet of the appellant. These are not deadly weapons, within the meaning of the law; and, when death results unintentionally from [361] their use in an assault, the result is not murder, but involuntary manslaughter." Now, in the Illinois cases, your Honor, that I have cited, Colorado cases, and the Massachusetts case, that is still the law of the land. The striking with the fists, your Honor, at this time would at the most be involuntary manslaughter if they have proven that she was struck with her fists. But in this case, your Honor, there is no proof of a striking. There is a statement that this girl left home at seven o'clock in the morning and came back at two o'clock in the afternoon and came back badly beaten up and bloody and I think from the evidence, your Honor, that shows that this woman was evidently down and was being kicked and struck around the back of the head, the fact from where the blood came from, bled into the hood of the parka, your Honor, and the only way it could have bled into the hood of the parka, your Honor, is if she was down and would have been beaten or being kicked while she was down. I don't see any other explanation for all the blood, the major part of the blood loss by Miss Cathey was in the back

of the hood. If the hood was on and the hood was hanging down the back, your Honor, it is impossible to see how any blood would be on it.

I think we can reconstruct that, and she was down and concealing her face in the hood when she was being beaten around the head and the many marks of kicking by small shoes, [362] marks all over her body, I think the Court has looked at those pictures and the only thing we can arrive at, your Honor, is the fact that she had been subjected to a heavy attack, that she had been down and that she had been kicked around the legs and the shins. Those black marks, a man slapping a woman around like that is not going to leave that type of bruises on, your Honor. So I think, your Honor, in this case that those matters should be taken into consideration and that the proper law be applied to this case and that the first degree and second degree should be in those cases verdicts of acquittal or judgment of acquittal should be granted.

Now, your Honor, in *State v. Wilson*, 142 Pacific Second at Page 60, was a case in which there was a fight between two men. People heard the fight and saw the defendant strike the deceased as they went through a door. The deceased died as a result of a basal skull fracture. No witnesses saw the fight. No witnesses testified as to what caused the injuries and the Appellate Court, your Honor, reversed the conviction. Now, in this case, your Honor, we have no evidence of what caused the death of Cathey. The doctor says he don't know. He says there might have been a bleeding from those capillaries, veins of the

brain for up to one month. He says it might have been a spontaneous cerebral hemorrhage occur at any time. He said it might have been caused by the blows from behind the ears [363] but there was no fracture of the skull although he made a very close inspection of that. It might be that the blows were such as to cause a sharp movement of the head and such as a prize fighter, he gets hit a hard blow with the glove. The doctors claim it is not the blow itself, the snapping back of the brain within the brain sac that causes it, so that could happen, but it could just as easily, your Honor, have been a cerebral hemorrhage. And it could just as easily have been a slow drain into the brain for a period of one month according to Doctor Anderson, who was the doctor called by the prosecuting attorney. He says he had no means of knowing or would he hazard a guess of what Miss Cathey was hit with. So, your Honor, I think that the case of *State v. Wilson*, 142 Pacific Second, 680, certainly should be given the same consideration as the cases I have heretofore cited as to why a first and second degree murder should be, that they, that this defendant should be granted a verdict of acquittal.

Now in *People v. Munn*, that is 3 Pacific at 651, the Court, the Supreme Court said that if the means employed be not dangerous to life or in other words if the blows causing the death are inflicted with the fists and there are no aggravating circumstances of malice aforethought, which must exist to make the crime murder, and then there was *State v. Cobo*, that is 60 Pacific Second, 952, and *People v. Palmer*, 87 Northeast Second at 391. And that case,

your Honor, was [364] cited in every reporter system in the library that the crime could be no more than involuntary manslaughter. Now, in *State v. Hughes*, which is 125 Southwestern Second at Page 66 the Court said in that case, motive is not an essential element of felonious homicide but in case if circumstantial evidence becomes important. Now, your Honor, in our laws certain elements are set out to, certain essential elements for, to constitute first degree and second degree murder. Now, first degree murder they said, whoever being of sound memory and discretion purposely and either of deliberate and premeditated malice or by means of poison or perpetrating, attempting to perpetrate any rape, arson, robbery, kills another is guilty of murder in the first degree. Now, your Honor, in the case at bar, one of those elements present, not one. I defy the District Attorney to show one of those elements that have been proven in this case.

Now, in Section 65-4-3 defines second degree murder. It says that whoever purposely and maliciously kills another is guilty of murder in the second degree, shall be imprisoned in the penitentiary not less than fifteen years. Purposely. Now, the law says, your Honor, that a blow struck by a person with his fist does not constitute purposely. It is involuntary. They are using something that is not considered as a dangerous weapon and as used possibly a means of punishment but not with any intention of causing death so that in this case, your Honor, [365] we do not have any of the elements

either of first degree or second degree murder because you cannot guess malice nor can you guess intent. There must be an intent and the law says there cannot be an intent where the fists are used. And they each go farther where the fists and feet are used it is not sufficient to charge, to effect a first or second degree murder. And then it says in regard to manslaughter that whoever unlawfully kills another except as provided in the last three sections is guilty of manslaughter, shall be imprisoned in the penitentiary not more than twenty nor less than one year.

Your Honor, in this case as I have stated before, there is not one scintilla of evidence that this defendant struck Myrtle Cathey, struck her to the point that she would be bruised from head to foot; that she would be rendered unconscious and that she would only linger for a period of nine days and then pass away. Does the Court think for one moment that traveling for three minutes from the Players Club to the Alibi club, a period of less than one mile, your Honor, I will say that is seven-tenths of one mile. I measured it last night. That all of those bruises could have been on Myrtle Cathey? Absolutely impossible; couldn't have been done. So that brings us back to the case of *People v. Bradshaw*, *McAndrews* case in which the Court—and the *Thomas* case, *Thomas v. Commonwealth* which I have cited before. [366]

Under the facts of this case, this defendant certainly cannot be held to answer for the crime of

murder in the first or murder in the second degree and even at this time, your Honor, as the government has rested there is a total failure of proof to show that this defendant committed one overt act and unlawfully killed Myrtle Cathey. Your Honor, we feel that the, that the Court should give a judgment of acquittal on the indictment entirely. Murder in the first degree and the included offenses. We feel there is no evidence to substantiate in allowing this case to go to the jury. All the evidence that has been put on there is evidence of what Mr. Urban has said. That is all they got, and he certainly hasn't said he beat Myrtle Cathey and we have to take into consideration these things are what we know, what we learn in the everyday pursuit of life as to what can be done and what cannot be done, and we must realize that what the condition of, that Miss Cathey was when she came home on the afternoon of the 22nd day of January, 1955, could certainly have not been inflicted in a taxicab which is run for three minutes from the Players Club to the Alibi Club in South Fairbanks. Absolutely impossible. We feel, your Honor, that the three motions in this case, your Honor, should be granted.

The Court: Mr. Stevens, shall we take a ten minute recess?

Mr. Stevens: Thank you, your Honor.

The Court: We will take a ten minute recess. [367]

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 4:05 p.m., the Court took a recess until 4:15 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel. Mr. Stevens, you may proceed.

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Your Honor, the motions for judgment of acquittal we think strike the first two degrees of the charge are included in the charge, the first and second degrees of murder more than the charge of manslaughter which is necessarily included in the indictment. We would call to the Court's attention that the requirements of first degree murder under our statute require, set forth that the government must prove that the act was purposely committed and we interpret that to mean that it was intentionally committed; that is, the defendant did an act, an intentional act which would produce death or great bodily harm. That is the type of specific intent and we believe that purposely implies the specific intent necessary for conviction of murder in either degree.

Also present in both degrees of murder is the element of malice and we don't believe that the question of malice, the definition of malice is any clear, more clearly set forth than it is in the case of *Collazo v. United States*, 196 Federal [368] Second, at Page 573. This is a District of Columbia case, a rather well-known case involving the attempt

to the life of President Truman. And on Page 577 of that case the Court charged as to the first count of malice, as to the first count malice is an essential element of murder in the first degree and murder in the second degree. "The term malice in this connection does not necessarily involve hatred or personal ill will or revenge, which is the meaning given to the term in other uses, although its meaning in the law includes such meaning. The term malice is much broader in its legal definition. The legal definition of 'malice' is the intentional doing, not the accidental doing, of any wrongful act to the injury of another without legal justification or excuse, and unattended by circumstances which reduce the act to manslaughter. The legal definition comprehends a heart regardless of social duty, a mind bent on mischief, a generally depraved, wicked and malicious spirit."

We believe that that definition would apply to our statute and that both that requirement would apply to both degrees of murder in our case also.

There is also present in the first degree statute the requirement of deliberated and premeditated malice and in the Johnson case, which I am certain the Court must be familiar with or probably is familiar with involving an appeal from this division, the Ninth Circuit Court case has interpreted [369] this requirement to mean that the defendant must have formed and reflected upon a preconceived plan to effect his intent and it went on to state that the, this process requires at least appreciable time,

although no particular period of time is necessary for that deliberation and premeditation.

Now in regard to first degree murder, we believe that the evidence in this case is sufficient to go to the jury to permit them to determine whether or not the requirements of our statute have been satisfied. The intent necessary is the intent to do great bodily harm or the intent to kill. I do not believe it is necessary to prove a specific intent to kill so long as a specific intent to do great bodily harm, from which death would ordinarily result is established. Now, in this case we had a beating of a woman who was admittedly in a very intoxicated condition. The defendant is a man of considerable size and weight, very heavy build. It is true that the woman was of a build above average, but she was still a woman and in her condition according to the doctor, the blows that were struck were the cause of the death, cause of her death. We believe that blows struck in that, struck against a woman in that state together with the attitude of the defendant as shown by his conduct in the Players Club, his conduct in the cab, and his conduct in dragging the woman from the Club, or from the cab into the club by the hair is sufficient in order for the jury to find that the specific intent did exist to this case. [370]

The question of premeditation and deliberation necessary only for first degree we believe also should be submitted to the jury. In this case the defendant went to the club to find his woman or mistress. The evidence shows that she was sitting at the bar with some G.I.'s and that he asked her to come home and

she would not come home. He pulled her off the stool. There is some evidence to show that as a result of this pulling or result of her condition she was on the floor at least for a short period of time and the the defendant took her forcibly from the bar. He also called her a bitch at that time as he pulled her off the stool. As far as the time element is concerned, the time element between the time when he took her from the club, took her off the stool, took her to the car, took her to the cab, put her in the cab, pushed her across the cab seat, got in, began beating her, again after he got out he took the time to walk up to the door of the club and came back to the cab again and then grabbed her by the hair and pulled her into the Club. All that time is sufficient time for the jury to find that he did in fact intend to commit greivous bodily harm on this woman and that he reflected upon it, at least that he had time to reflect upon it. It is a question for the jury as to whether he formed the plan and whether he deliberated upon it, if there is sufficient evidence from which they could find that such is the case.

We would point out the Court that the [371] Doctor's testimony shows not only were there blows to the face and to the body, but there were specific, the Doctor used the word, discreet blows, behind each ear, a very vital spot on the body and one which demonstrated that blows had been administered to the area of the head known as the mastoid process and those were present when the Doctor came in the evening on the 22nd day of January, 1955.

We believe that there is evidence sufficient in this record to show and to allow the jury to infer that the beating continued after the witness Jennings pulled away in his cab and after the defendant pulled the deceased into the Club Alibi.

Now, the question of malice, as well as the question of intent is one that is a difficult one in this case, admittedly. We could call the Court's attention to the annotation in 22 A. L. R., 2nd, at Page 854. It is the annotation of *Commonwealth v. Buzard* which appears at 76 Atlantic 2nd, Page 394. That is the case of conviction of second degree murder which was affirmed on similar facts as this, although this was a case of a large powerful man beating a small weak man, not a man and woman situation, but the annotation sets forth the cases which apply to both the question of inference of an intent to kill and the inference of malice. In cases of first and second degree murder, and the government admits that ordinarily neither the intent to kill or do grievous bodily harm nor the malice itself may be inferred from a mere beating, but in [372] almost every case and in particular the *McAndrews* case cited by the defense, the Court is careful to recognize that a case can exist in which mere beating alone is sufficient to substantiate a conviction on either degree of murder. For instance, this case cited by the defense, *People v. Crenshaw*, which is 131 Northeast at Page 576. It is also annotated at 15 A. L. R., 671, closes with the statement, "there might be a case in which the disparity and size and strength of the parties might be so great that a blow

delivered with the bare fists might reasonably be expected to result in dangerous or fatal consequences, but there was no difference in the two men in this case that a blow by the fist of the larger man would probably cause death." The McAndrews case is to the same effect and in *Milosevich v. People*, 199 Pacific 2nd, Page 895, the Supreme Court of Colorado affirmed a conviction of second degree murder on cases which are very, on facts which are very similar to this case. In that case the defendant had awakened the local doctor and told them that his mistress was sick and by the time the doctor got to the residence he found her dead. She was in a beaten condition and there was blood in evidence. There was also the situation that her fingers were lacerated by forcible removal of the rings and the Court affirmed a conviction of second degree murder on that evidence and it stated on page 897 that "the McAndrews case is likewise against Paul. It recognizes that bodily assault alone, without the [373] use of any weapon or instrument, may, under such circumstances as here appear, support a verdict of murder, and that the conclusion is for the jury."

The Court: Mr. Stevens, may I have that citation again, please?

Mr. Stevens: That is 199 Pacific 2nd, 897.

The Court: Thank you.

Mr. Stevens: The general rule then is that neither intent to kill or do great bodily harm or malice can be inferred from a mere assault and battery. If, however, there are other circumstances which show exceptional violence and brutality and

from which malice can be implied, both the intent and malice may be inferred by the jury from the circumstances.

And this annotation sets forth cases from Alabama, Arkansas, California, many states wherein convictions on first and second degree murder arising out of instances in which no dangerous weapon had been used were affirmed. And that is true as to both malice and intent according to this annotation in the cases cited there, both of these may be inferred by the jury from a proper case and the question then is whether this is the proper case and we believe that from the testimony before the Court brought forward by the witnesses there is no question but that this is a proper case in which to let the jury decide the issues.

I would call the Court's attention to the fact [374] that Mr. Jennings testimony is corroborated by Mr. Haratos who stated that as he left the Players Club going out to see what had happened to the woman he had bought the drink for that, this Pat, he noticed that she was in the back of a cab pulling away and someone was beating her about the head. Now, Mr. Jennings is the driver of that cab.

Mr. Taylor: If the Court please, I would certainly like to find out where in the record that appears.

The Court: You may proceed. Mr. Taylor commented on some evidence that the Court wasn't aware of and I am not aware of that particular statement, but you may proceed.

Mr. Stevens: I believe that that is in the record.

We have not checked the official record, but we can, we checked our notes to make sure.

The Court: You may proceed.

Mr. Stevens: Now, as I stated, we believe that almost every case wherein a conviction has been reversed on either first or second degree murder which arises out of a state of facts in which no dangerous weapon was used, it is stated that a situation can exist where both malice and intent could be implied. The McAndrews case, as qualified by this later Colorado case, definitely is to that direction.

We also have the case of *Commonwealth v. Lisowski*, which is in 117, 117 Atlantic. I'm sorry, I don't have the page. It is a case of first degree murder which was [375] specifically upheld on a case similar to this. And both intent and malice were inferred from the facts.

Now, second degree murder, should the Court feel that the case is not sufficient to submit to the jury on first degree murder, is necessarily included in our indictment and the requirements are the same except for the premeditation and deliberation which is not required by our statute. The issues are then whether there was intent to kill or do great bodily harm and whether there was malice as defined by the cases, and we again state that we believe this Collazo definition is about the best that we have seen. Now, there are many cases in which second degree murder arising out of similar circumstances have been affirmed. The case of *Commonwealth v. Dorasio*, 47 Atlantic 2nd, 125 is a case of second degree murder arising out of a beating. One man against

another and that case also refers to *McAndrews v. People* and what is probably the leading case on the subject, *Wells v. People*, 30 Michigan 16. It is cited at length in this Dorasio opinion and the conviction of second degree murder was upheld.

The Lisowski case that I referred to is 117 Atlantic at Page 794, and this is a case which Mr. Taylor obviously referred to where a man beat his wife for a period of over forty minutes. That is a first degree murder conviction. The question arises because the law would normally infer or permit an inference to be raised from the use of a deadly weapon which [376] is calculated to produce death and death in fact results from the use of the weapon but where there is no dangerous weapon and it is admitted in all cases that were cited, I take it, that the fists are not dangerous weapons, then the problem comes as to whether or not the fists were used in such a manner that the defendant could reasonably have known that death or grievous bodily harm would be likely to result from his actions. Now, if that is the situation and malice is also present, the cases, at least a case of second degree murder for the jury to decide. The case of *State v. Jensen*, a Utah case arising out of a situation in which there was no dangerous weapon used, it is also a second degree murder conviction. Most of the authorities are, in this annotation, are referred to in the *Jensen* case and it is specifically pointed out in the *Jensen* case the difference in the size of the parties and the relative strength of the parties.

The case of *Commonwealth vs. Buzard* is a case

which is annotated that we have referred to the Court. That is a similar case in which another second degree murder was affirmed. Murder conviction was affirmed. It then becomes a question, in our opinion, as to whether the facts as presented by our evidence, justify the Court's finding that even though normally intent and malice cannot be inferred, intent and malice could be inferred from this state of facts, and we believe that the Court is familiar with the evidence; that in [377] view of the brutality which has been revealed here, the size of the parties according to our record, the estimate of the doctor and of one other witness was that Miss Cathey was approximately a hundred fifty pounds. She was a woman of approximately five, six, five feet, six inches. The defendant is a man of above six feet. He is extremely heavy man and a powerfully built man and if he committed the violence upon this woman in the taxicab, just the violence that was described in the taxicab and in leaving the taxicab by Mr. Jennings, then he definitely exhibited a wicked and depraved spirit and as the cases say, a mind bent on mischief and regardless of social duty. The cases also point out and there is one case specifically referred to in this annotation where one of the, where the deceased was ill even though the size was relatively the same, the deceased was ill and unable to defend himself and the facts of this case as revealed by several witnesses show that Mrs. Cathey was definitely unable to defend herself. She was unable to get in the cab by herself and yet she received this beating in the back of the cab, which was to

such an extent that she was completely unconscious when she was taken from the cab and was bloody. Now, the presence of the other bruises, which also could have caused her death, the Doctor, as I understand his testimony, has testified that in his opinion several of the blows would have been [378] sufficient to cause death but he believes that the death resulted from all of the blows in this case and he would not tie down the death as to any one of the blows so under the circumstances there definitely is both malice and the intent to do an act which the defendant knew should have, would have resulted and did in fact result in death.

We feel that under the state of the facts and in view of the doctor's testimony there can be no question of the propriety of submitting this case to the jury on the question of manslaughter. The unlawful killing of another according to our statute and if they find, if the jury can find and do find from the evidence that Mr. Urban did give the beating to Miss Cathey and that the proximate result of that beating was the death of Miss Cathey and it was definitely an unlawful death and an unlawful killing, so the issue of manslaughter and I take it, it is not too heavily contested as to whether or not the jury should take this case on the question of manslaughter alone.

This annotation also has included several cases wherein conviction for manslaughter was upheld under similar facts and they are included specifically because the Courts in many cases have stated that although the jury found the defendant guilty of only

manslaughter the facts would have warranted a conviction of either murder in the first degree or the second degree. [379]

Now, there is a serious question in our mind. The defendant has not raised the issue of negligent homicide. We did not think it would normally be involved in a case such as this. The facts show that the doctor told the defendant that he should call him the next day if the patient needed care. He did not call him for a period of eight days. Over that period of time we have had witnesses who testified that she was moaning and groaning, she was out of her head and if the jury found that the defendant was grossly and wantonly negligent we believe that a negligent homicide conviction under our laws might be proper. We are not urging the Court to submit that to the jury, but we state that it could be possible.

We cite to the Court the case of *Barbeau v. United States*, at 193 Federal Second, 493, I beg your pardon, it is 495, 193 Federal Second, a case arising in Alaska reviewed by the Ninth Circuit. There was a first degree murder indictment charging that the defendant purposely and with deliberate and premeditated malice killed one Paul Gummy by shooting him and the evidence showed that the discharge of the weapon might have been an accident and the Court upheld a negligence homicide conviction under that indictment.

Now, as again I say we are not urging the Court to submit that question to the jury, but the, it could be supported. We also believe that the jury would have the right [380] to take into consideration this

evidence concerning the previous time in which, merely out of an argument, the defendant back-handed this woman and knocked her off the barstool to show his intent and state of mind at the time this other beating was administered, if it was administered. They can take into consideration the fact that he has told repeated versions of the cause of the beating that Miss Cathey got. He started off by stating one thing to Officer DeWalt. He stated another version to the nurses; he stated another version to Officer Byrom just previous to the woman's death. He told Mr. Goodfellow it was nothing but a hair-pulling contest of a couple of women and specifically named the woman as Peggy. Two hours later he didn't know the woman's name and told Mr. Wirth a different story.

The officers interviewed him in the Alibi Club on February the 4th and he told them another story and he told them that all the stories he had told before that were not true and then on top of that he goes down and tells Mr. Mayfield and Mr. Goodfellow and Mr. Wirth a story which, although is within the same framework of the one he had just told Mr. Wirth and Mr. Goodfellow, is contradictory to the extent that it almost reaches an absurdity. As we count them there are eight or nine different versions of the defendant's own story of what happened here and that in itself is something the jury can take into consideration to determine the [381] defendant's intent, his state of mind and what his purpose was if he did in fact administer the beating to this woman. From the law as we see it, we believe

that this case should be submitted to the jury on all three degrees, first degree murder, second degree murder and manslaughter, and we request the Court to deny the defendant's motion for a judgment of acquittal as to all three counts.

Thank you.

The Court: Mr. Taylor——

Mr. Taylor: If the Court please, Mr. Stevens failed to call to the Court's attention the fact that the doctor in this case said that no, none of the blows would have caused death, the blows themselves would not cause death, that death resulted from a hematoma of the brain which might, that might have started a month before or it might have started after the blows or it might have started, might have been instantaneous or spontaneous rupture of the capillary veins of the brain. So I don't believe, your Honor, to take into consideration any of those blows because we know that a great many of those blows was inflicted entirely apart from the cab, the taxicab. When the doctor says that none of these blows would cause this death and that the only cause, that the death was from a hematoma of the brain, either of long duration or one week or possibly spontaneous.

Now, we do, he says we should not, we are not contesting the submission of this case to the jury on manslaughter. [382] I am strenuously contesting it, your Honor, because there is no evidence before this Court at the present time that this man did brutally beat the defendant, or beat the deceased; a little back-handing which is more or less in the nature of

a slight reprimand and occasioned no bad feelings, not impute malice to something a month later and brutality only has to be, can only be presumed in this thing, your Honor.

And then also Mr. Stevens has misconstrued the evidence in this case also, that the doctor said he asked him to call in. He did call in three days later and told him how the lady was getting along and the doctor phoned to Williams Drug Company a prescription for this man to pick up and he said he put it in Myrtle Kelly, or not Myrtle Kelly, Martha Kelly, which is said is a mistake, it could be easily made. So then the improvement was such a few hours before her death that he didn't have to call the doctor. He gave her fruit juices. He cooked for her, she cooked for herself part of the time. What was the necessity of having a doctor? Also the testimony as to what Mr. Urban did the night that he picked her up at the Players Club, the fact that Miss Cathey called him up to get her and he did come down there and get her and then I am quite amused at Mr. Stevens' statement about these various stories. There was three stories given about the same thing and Mr. Urban, after Miss Cathey gave, why he gave those stories and he told the story, but we want to remember, too, [383] that the three officers were sitting in the conference. Three of those stories are different because three different versions of the same thing as told by Mr. Urban at one time, so it is the faulty memory of the officers that has resulted in the three different stories.

We have no cause of death here, your Honor, and

the stories are much more plausible and much more deserving of credibility than the statement of Jennings, the taxidriver. Now, Mr. Stevens has brought in a number of cases here and every one of them he brought in, your Honor, can certainly be distinguished between the cases that are analgous to the case before here where just the fist was used, and he cites the case with pride, I think it is a Buzard case, a Colorado case. There was a robbery connected with that because the fingers showed the forcible removal of rings. That was a death that was occasioned during a robbery, although maybe no weapon was used. Still there was enough force applied within the robbery to cause the death of the woman. That case is not in point, your Honor.

Also, he speaks about this case, *United States v. Collazo*, the Puerto Rican tried to make an attack on President Truman. They were blazing away with guns there, your Honor. That is not a case analgous to this. That has no relation to this, and cases where a man has beat a person for forty minutes, case where a big man beat a woman for forty [384] minutes.

This here, your Honor, the small disagreement between these people for two and a half minutes, three minutes, coming from the Players Club, your Honor, to the Alibi Club, is certainly not, say it is a protracted or can you say it is a brutal beating because the only thing that showed that her nose was bleeding, according to Jennings, when she got out of the car, said it dripped down on the red jacket. And certainly she couldn't have bled into the hood of that

jacket, your Honor, going three and a half minutes and the jacket was on her.

Now, this negligent homicide. This negligent cause of death, not taking care of Mrs. Cathey has certainly been refuted, your Honor. The fact that he did call the doctor, he did provide her with food, cooked her food, provided her with fruit juices and stuff for a period of nine days. In fact he closed the bar, closed his business up there for awhile so as to take care of her. So we think, your Honor, that malice and intent have certainly been just not indicated by the acts of this defendant. He has shown a solicitation for the welfare of Miss Cathey. He done everything he could, in fact he was carrying out her own wishes when he told the story that, because she didn't want the actual cause of why she was in the hospital known, not the actual cause of her death but after she died then Mr. Urban went voluntarily to the officers and told a story. That is the one he told all [385] the officers.

We think, your Honor, in view of the decisions—I might say, your Honor, I have here some notes more or less memorandum cases if the Court would like to have these, perhaps——

The Court: Mr. Taylor, what is your theory as to whether or not negligent homicide is an included offense?

Mr. Taylor: Well, I can't see where it is included, your Honor. We don't have a negligent homicide statute up here, because if it is negligent homicide, your Honor, is is synonymous with man-

slaughter. It is equivalent to manslaughter in other states. It is manslaughter in itself.

The Court: There is a separate statute, I believe, negligent homicide statute in the Territory of Alaska, and I am wondering whether it is your position that that is an included offense?

Mr. Taylor: Oh, I don't think so, your Honor. Negligent homicide would be like leaving a person out in extreme cold, he couldn't move or something that way, or hit them with a car doing a lawful act in a wreckless manner. Here there was no unlawful act committed. Would the Court like this memorandum?

The Court: I would be pleased to have you submit it, and——

Mr. Stevens: Is there a copy for the [386] government?

Mr. Taylor: I will get you one. I only brought one down. I will submit one.

The Court: Gentlemen, while the Court at this time is inclined to believe that the testimony of Jennings coupled with the alleged inconsistent statements of the defendant is sufficient to carry this matter to the jury as to the two degrees of murder and manslaughter, nevertheless I want to look into the matter more carefully and fully and I will rule on it at five minutes of ten next Monday morning.

Mr. Stevens: Thank you. Would your Honor care to set a time for the presentation of requested instructions?

The Court: Well, I certainly would like to and this would be perhaps a good time. We cannot an-

ticipate how long it is going to take the defendant to put in its case or how much rebuttal there may be, but I think certainly as you gentlemen as practicing lawyers know that the sooner I can get your requested instructions the better for the Court and——

Mr. Stevens: We would be prepared to submit them by five o'clock Monday evening, your Honor. I believe that would be——

The Court: Would that give you time enough, Mr. Taylor?

Mr. Taylor: Well, I think that is a little previous, your Honor. The fact that we will be putting on the defense's [387] and I think that will possibly go over into Tuesday. I don't see how we could possibly finish this case Monday.

The Court: Of course, I want your requested instructions before the evidence is concluded so that I can rule on them prior to argument.

Mr. Taylor: Well, how about Monday at five o'clock?

The Court: Very well, assuming that the case is still going on at that time.

Mr. Taylor: Yes, well, I know it will be Tuesday.

The Court: Very well, five o'clock next Monday afternoon then will be, in fact, I will make it five-fifteen will be the latest time for receiving requested instructions.

Mr. Stevens: Thank you, your Honor.

(Thereupon, at 5:00 p.m., the trial of this cause was adjourned until May 23, 1955, at 10:00 a.m.)

May 23, 1955—9:55 A.M.

Be It Remembered, that upon the 23rd day of May, 1955, at the hour of 9:55 a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Let the record show the presence of the defendant Leon D. Urban, and his counsel.

Mr. Taylor: If the Court please, I have served a motion upon the place usually occupied by Mr. Stevens and I am filing with the Clerk—— [388]

The Court: The Court at this time denies the motion of the defendant. The case will proceed at ten o'clock and in the meantime the Clerk, please, call the roll of the venire.

(Whereupon, the Clerk of Court proceeded to call the roll of the veniremen.)

The Clerk: The Court wants me to announce to you jurors that he realizes that in the summertime it is difficult for some of you to serve, you have got things to do and everything else. However, we have got to have a jury through the summer in order to try to get the calendar cleaned up, so the Court wants those that feel it is imperative that they be excused to report to him in chambers at the eleven o'clock recess and he will, and he will talk to you then about being excused. We know there is some of you that feel that you should get off and need to get off so if those that feel it is imperative that they be excused, see the Judge in chambers back here at the eleven o'clock recess. And all others are to report at

ten o'clock on Thursday, the 26th again. There will be no work for the jurors other than the twelve on this case which ran longer than anybody thought about. Would you please report, those that aren't excused at eleven o'clock, will report on Thursday at ten o'clock and you may now be excused? Inasmuch as the defense is starting its case this morning, are there any people here who are witnesses for the [389] defendant in this case or the plaintiff, yes, will I presume Mr. Taylor they all know that. There is nobody here that is a witness for the defense. I guess there aren't any. You want the jury called in.

(Thereupon, the jury entered the courtroom.)

The Court: Is the defense ready to proceed?

Mr. Miller: Yes, your Honor.

The Court: Government ready?

Mr. Stevens: Yes, your Honor.

The Court: Then the Clerk may call the roll of the jury.

(Whereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: You may proceed.

Mr. Taylor: If the Court please, I imposed a motion this morning, left a copy with Mr. Stevens and I would like to argue that motion, your Honor, before we proceed with the case.

The Court: You wish to argue it in the absence of the jury?

Mr. Taylor: In the absence of the jury, your Honor.

The Court: Are you prepared at this time, Mr. Stevens?

Mr. Stevens: No, your Honor, this was not served on me, it was left on the table in here. I am not prepared. I [390] would like to postpone the argument until after the noon period, if the Court would do that. I also think that it is a matter that has been ruled on twice already.

The Court: Be agreeable to be heard on that motion at one-thirty, Mr Taylor.

Mr. Taylor: If the District Attorney will not use the so-called exhibits in the meantime.

The Court: I don't know whether the occasion will arise to use them or not. I don't suppose Mr. Stevens knows.

Mr. Stevens: I have no idea how long Mr. Taylor's case will take, your Honor.

The Court: We will proceed and if it becomes necessary or if the government feels it adviseable to use those exhibits during this forenoon the Court will then take up the advisability of hearing arguments on the motion before they are used. Is that agreeable, Mr. Taylor?

Mr. Taylor: Yes, sir.

The Court: Very well. Proceed.

Mr. Taylor: We will call Mr. Urban.

LEON D. URBAN

the defendant, called as a witness in his own behalf, was duly sworn and testified as follows.

Direct Examination

By Mr. Taylor.

Q. Will you state your name, please? [391]

A. Leon D. Urban.

Q. And you are the defendant in the case now on trial in this Court? A. Yes, sir.

Q. Where do you reside, Mr. Urban?

A. 2245 Cushman, Alibi Club.

Q. And how long have you resided in Fairbanks?

A. A little over three years.

Q. And prior to that, where did you reside?

A. I was in Anchorage.

Q. And how long have you been in the Territory all together?

A. Well, off and on about eight years.

Q. What part of the states are you from, Mr. Urban?

A. Well, I spent right at twenty years in Eureka, California.

Q. Were you in business in Eureka, California?

A. Yes, I run a bar there for four years for a man on a percentage basis and then I have been in different, hamburger businesses and small restaurant businesses myself.

Q. And during the recent war were you in the service? A. Yes.

Q. What branch of the service were you in?

A. I was in the Army.

(Testimony of Leon D. Urban.)

Q. And how long did you serve in the [392] Army?

A. A little over three years all together.

Q. And where was that service?

A. South Pacific.

Q. Now, you have stated you been in Fairbanks for about three years, is that right?

A. Yes, sir.

Q. And what has been your occupation while you were at Fairbanks?

A. Well, I come up here in August, I run the Arcade for Larry Starns and Mr. Swank down in the bus depot. That is when the new bus depot first opened up.

Q. And how long were you, did you run the Arcade for Starns?

A. Well, up until Christmastime.

Q. And since then what have you been doing?

A. Well, I own that war surplus store on Third Street, 649 Third.

Q. What is the number? A. 649 Third.

Q. 649 Third, and when did you open that up, Mr. Urban?

A. April the 2nd, that is three years ago.

Q. And what is that business consist of?

A. It is Army surplus clothing, used clothing and furniture and just about everything.

Q. You have been in that then for a little better than [393] three years, is that right?

A. Yes, sir.

Q. And do you have any other place of business?

(Testimony of Leon D. Urban.)

A. Yes, I own the Alibi Club and I have an auction sale at 23rd and Cushman, sell by auction out there.

Q. And what type of goods do you sell there, Mr. Urban?

A. Well, everything, whatever is brought in we buy it. Furniture most generally it is.

Q. And what kind of a building, if any, do you have for that purpose?

A. Well, I have a building twenty-six by fifty.

Q. And what type of material do you, or goods do you sell?

A. Well, just about everything you can mention. Lots of things I don't even know what it is they bring out to sell. There is everything there from clothing to cars.

Q. Is that, is that goods that you buy from the Army at surplus, at sale?

A. Some is bought from Army; some is brought in by individual people. Everybody brings their——

Q. And how long have you been running that part of the business?

A. Oh, a little over a year, last, about May the 2nd was the first Monday in May, I believe, I opened last year a sale. [394]

Q. Now, you say that you are, have a place of business called the Alibi Club? A. Yes, sir.

Q. What is the nature of that business, Mr. Urban?

A. Well, it is out of town business, it is a bar.

Q. And where is that located?

(Testimony of Leon D. Urban.)

A. It is 2245 Cushman.

Q. And what kind of a building is that?

A. Well, it is a square frame building, it is twenty-eight by twenty-eight on the outside.

Q. Twenty-eight by what?

A. Twenty-eight by twenty-eight, I believe that is what they say it is on the outside.

Q. And you have a bar in there?

A. Yes, sir.

Q. What other rooms do you have on that, is it a one-story building?

A. Yes, sir.

Q. What other rooms, if any, do you have on the ground floor?

A. Well, there is a small room we used to use for a storeroom and last winter we did use it for a sleeping room.

Q. And is that open directly onto the bar, the door to that?

A. Well, you come in to the left and there is a little [395] room where there is a dance, whatever you want to call, where there is two tables and chairs that you can set and then there is a small room, a door off to it.

Q. And that is equipped as a sleeping quarters then, Mr. Urban?

A. It is now, sir.

Q. And do you have any other house or building on your property there?

A. Yes, there is a log building in the back of the same building. We have two bedrooms in there. We have the rest of the building we use it to store furniture and shoe packs and Army surplus, what have.

(Testimony of Leon D. Urban.)

Q. Who, are you the sole licensee on the license for the Alibi, Mr. Urban?

A. I have, Myrtle Cathey is a partner on the business, the bar business.

Q. And how long has she been, or was she a partner in the that business?

A. I put her, her name on the license and she bought in there in October, I believe it was the 28th. Dixie could tell you. He is the one who drewed the papers up, November the 28th, I believe it was.

Q. November the 28th. How long have you known Myrtle Cathey?

A. Well, I met her along the last of August, I believe [396] last summer when she come up here from Long Beach.

Q. And to your knowledge, was that her first trip to Alaska?

A. No, sir, she told me afterwards she had been in Anchorage.

Q. And then in August she came to Fairbanks, is that right?

A. Well, she come up from southern California. I don't know just exactly the date because I didn't meet her when she first come up.

Q. Now, was she a full partner in the Alibi Club?

A. Well, she never did get the bills paid off. She agreed to pay so much but I furnished the money for the license and everything. She never did get it paid.

Q. But she still did—— A. Yes.

Q. Did she work in the Alibi Club?

(Testimony of Leon D. Urban.)

A. She tended bar.

Q. And she work a regular shift there?

A. Yes, she opened up every evening and sometimes she worked nine or ten hours. Sometimes she worked clear through till morning. She had a marvelous personality and a very good bartender.

Q. Did, did Miss Cathey drink? A. Yes.

Q. What would you say as to whether she was a light [397] drinker or heavy drinker?

A. Well, she could drink a fifth of whiskey at any time in a matter of a shift. She took a drink whenever anybody bought her one and she wanted one she just poured herself one.

Q. Would she become intoxicated?

A. Yes, she did get drunk very often. That was our main——

Q. And would she stay there and tend bar when she was intoxicated?

A. No, when she would get drunk she would want to leave then. She would want to go see what the rest of the world was doing.

Q. She wanted what——

A. She wanted to see what the rest of the world was doing. She wanted to get out and see what was going on.

Q. And how many occasions did she take off that way, Mr. Urban?

A. Well, a couple of times a week she got to drinking or she would get to worrying and then she would go ahead and drink and then she would want to go out.

(Testimony of Leon D. Urban.)

Q. And about how long would she be absent?

A. Well, sometimes she wouldn't get home until next evening. Sometimes she would be too drunk to work and then I would work or just close the place up.

Q. Did you have any other bartender [398] employed?

A. Well, for awhile I had a man by the name of Tom Deerington. That was before Christmas.

Q. Now, on these trips, these absences from the place, did Miss Cathey ever get into any trouble while she was out on those drunks?

A. Yes, different times she has come home with her arms all black and blue and last time she——

Q. Just a moment. What was her nature when she would get intoxicated?

A. Well, she was kind of mean.

Q. By mean what——

A. Well, just kind of short tempered. She would want to stay out and just keep roaming around. That is when she never wanted to go home. Business never amounted to anything to her when she was in them moods.

Q. Now, Mr. Urban, while she was working there do you know of any occasions you say you know of occasions when she come home bruised up, do you know who bruised her up?

A. No, she would never say. You could ask her how it happened. She would say, well, that is my troubles, I will take care of my own troubles.

(Testimony of Leon D. Urban.)

Q. Now, calling your attention to one instance, did you ever know of her getting in trouble with a carpenter? A. Yes.

Q. What was that trouble and when did it happen? [399] A. Well——

Mr. Stevens: I object to further answer on this unless it is brought out how he got the information. If it is hearsay derived from the deceased I am going to object to it.

The Court: I think your objection is well taken. Sustained.

Q. (By Mr. Taylor): Who did you learn about that trouble from? A. The man himself.

Mr. Stevens: I object to any further conversation. The man would be the best witness.

Q. (By Mr. Taylor): And you know the man's name? A. No, I don't, sir.

Q. And what, if anything, did Miss Cathey say about it?

Mr. Stevens: I object to that. That would be hearsay, your Honor.

The Court: Sustained.

Mr. Urban: Well, when the man——

Mr. Stevens: Just a minute, Mr. Urban, that was sustained.

Q. (By Mr. Taylor): Now, Mr. Urban, I will ask a question did, just state whether or not that you had to pay the carpenter some money to square the trouble? [400] A. Yes, sir.

Q. How much you give him?

A. Sixty dollars.

(Testimony of Leon D. Urban.)

Q. And what was Miss Cathey's condition when she came home that time? A. She was drunk.

Q. Did she show any evidences of being in a fight or an altercation?

A. Yes, her arms, around her chest was all black and blue.

Q. And when did that take, when did that occur, Curly? A. Just before Christmas.

Q. Now, what room of any of these that you have described was occupied by Miss Cathey while she was working in your place?

A. The one in the bar, the one right off the bar in the Alibi Club.

Q. And where in relation to the Alibi Club was your other two bedrooms?

A. Just behind the building, about twenty feet back is all.

Q. And how would you get to those rooms?

A. Well, you could either walk out the back of the Alibi Club or out front and go around to the, or go through the sale building. Either way you wanted to go.

Q. Sales building, was that what you referred to as [401] warehouse awhile ago? A. Yes.

Q. Now, calling your attention to the 22nd day of January, 1955, would you state whether or not Miss Cathey worked her shift that day?

A. Yes, she worked until around twelve, that would be the 21st that she worked up until about twelve, the 22nd the next morning would be. She worked awhile that evening.

(Testimony of Leon D. Urban.)

Q. That would be on the evening of the 21st she worked? A. Yes.

Q. And how late did she work?

A. Oh, she worked until around twelve, twelve-thirty I guess.

Q. And who relieved her? A. I did.

Q. And about that same time? A. Yes.

Q. And what, if anything, did Miss Cathey do at that time?

A. Well, she changed clothes and she went out. She said she was going out, out to the Players Club and have a drink or a couple of places and have a few drinks and she left afoot.

Q. Who, if anybody, did she leave with?

A. She left a walking. She always walked [402] a lot.

Q. Just a moment till this put-put gets out of here. What was your answer to that question?

A. I believe she walked that morning.

Q. And that belief based upon fact she didn't call a cab? A. Well, she didn't use the phone.

Q. And how late did you work your shift then, Curly?

A. Well, about two o'clock she called me up and wanted me to come to the Players Club.

Q. About what time?

A. About two that was the first phone call. Then around three o'clock she called again and said well, come on down and have a drink and we will go home, so I had some customers and couldn't get out right then so around a quarter after three or some-

(Testimony of Leon D. Urban.)

thing like that I left and Sherry, I don't know her last name. I know her in California.

Q. That was a lady that testified here?

A. Yes.

Q. A little hard of hearing? A. Yes.

Q. Go ahead.

A. So she said well, I will take you down, Curly. She was driving a pick-up, so we got in the pick-up. We stopped at the Youngs, that is the Nugget Bar. We bought a drink there so we went down to the Players Club. We went in the Players [403] Club and Mrs. Cathey was there and there was some other man and a lady sitting there and I don't know, about five or six or seven people, maybe eight counting the bartender. So I bought a drink for everybody there.

Q. Where was you sitting, Mr. Urban?

A. Well, Sherry was sitting next to Pat and I was on the other side of her, on the right-hand side of the bar as you go in.

Q. And did you talk to Pat? A. Yes.

Q. How was your relationship with her at that time, amicable or otherwise?

A. O. K. Everything was all right. She was talking. She said——

Q. Then after buying that drink you say you bought for the house? A. Yes, sir.

Q. You remember how much it cost you?

A. Well, fact is I bought two drinks all together and I had four dollars left so it was about eight dollars a round, I believe.

(Testimony of Leon D. Urban.)

Q. You had four dollars left out of what?

A. Out of a twenty-dollar bill.

Q. Out of a twenty-dollar bill it would be eight dollars a round, is that right? [404]

A. That's right.

Q. And could you state with any certainty how long you remained at the Players Club?

A. No, I couldn't, sir, not right exact time.

Q. And then you know you went down there after three o'clock then, is that right?

A. That's right.

Q. And you had the two drinks and what did you do then?

A. Well, I said Pat, I said, let's go home. First she said well, I will have my drink and then we will go. So I said come on Pat, let's go home, it is time to go to bed. Well, I got her by the arm and she got off the stool and we went out and got in the cab.

Q. What was her condition at that time, Curly?

A. Well, she, about half drunk.

Q. And——

A. It is pretty hard to tell on her just how drunk she was.

Q. Did she resist going to the car?

A. No, she was staggering. I did have ahold of her but she wasn't fighting or anything to get back until we got to the cab. Then she said oh, I don't want to go home now, so I put her in the cab.

Q. Now, did you see her fall down in the Players Club?

A. No, sir. [405]

(Testimony of Leon D. Urban.)

Q. Did she fall down? A. No, sir.

Q. Not while you were there?

A. Not while I was there.

Q. Do you know who was driving the cab?

A. No, I don't know for sure who it was. I never paid any attention to the cab driver. When I wanted a cab, it was parked I just got in it.

Q. You heard a Mr. Jennings testify as to he picked you up at the Players Club?

A. Yes, sir.

Q. And when, who got in the cab first?

A. Pat.

Q. And which way was the cab heading?

A. Well, it would be heading toward, into the Players Club, would be north, I guess.

Q. And what side of the cab did she get into?

A. The opposite side of the driver's side.

Q. And which side did you get into?

A. The same side.

Q. And then when you got in did Pat naturally had to slide over, is that right? A. Yes.

Q. Now, what help if any did you give her getting into the cab? [406]

A. Well, I opened the door and she got in, but she was trying to get out the other side.

Q. She was trying to get out the other side?

A. Yes, sir.

Q. And what did you do?

A. Grabbed ahold of her.

Q. And then what happened?

(Testimony of Leon D. Urban.)

A. Well, I told the cab driver to take us to the Alibi Club.

Q. And——

A. So there were a few words on the way home, but that is about all.

Q. What acts of physical violence, if any, took place?

A. Just none only I had her by the arms, I had her by one arm and she tried to open the door and I grabbed her by the other arm. There might have been a few words from both sides.

Q. Now, Curly, do you know how far it is from the Players Club to the Alibi Club?

A. No, I don't know to tell you truthfully, I don't know. It is ten blocks or something. Was that on 13th?

Q. Do you remember riding in a car a few nights ago in which the distance was measured from the Alibi Club?

A. Yes, I do, but I never, I forgot the measurements myself. [407]

Q. Now, you did know them at the time?

A. Who I rode with?

Q. No, do you know, did you know the distance that showed on the speedometer?

A. Yes, I remember the two men I rode with checked and I, it slipped my mind the exact, because I remember he said it was eighteen feet over a half mile or a quarter of a mile or——

Q. Well, for the purpose of refreshing your memory, was it seven-tenths of a mile?

(Testimony of Leon D. Urban.)

A. I believe so.

Q. And now when you got into the car did you immediately leave for the Alibi Club? A. Yes.

Q. How long did it take, did it take you to drive—wait, I will ask you, just withdraw that question. What would you say as to the traffic on the roads at that time of the morning?

A. Well, I don't believe there would be much traffic that time of the morning.

Q. Did you see any traffic at all on the way?

A. No, I didn't.

Q. And how long did it take you to go from there, from the Players Club to the Alibi Club?

A. I don't know how long it took us, but most generally [408] it don't take over two or three minutes the way most of them cab drivers drive that time of the morning.

Q. Would you say then, Mr. Urban, that the testimony given by a cab driver named Jennings, who said it was a mile and a half from the Players Club to the Alibi Club was wrong?

Mr. Stevens: I object to that. I don't believe there is anything in the record that says a mile and a half.

Mr. Taylor: Mile and a half he testified to, look at the record.

The Court: I have no way of knowing. I have no way of checking. He may answer.

Mr. Urban: I believe he was wrong. It would be out of the city limits if it was.

Q. (By Mr. Taylor): You think he was wrong

(Testimony of Leon D. Urban.)

when he said it would take five minutes to drive that distance? A. Yes.

Q. Have you driven it many times, Mr. Urban?

A. Yes.

Q. That time of the morning when traffic is light?

A. Yes. It was twenty or thirty below along about that time. Not many people out then.

Q. What was the weather that night?

A. I don't remember for sure. It was around twenty or colder. It had been pretty cold along about that time. [409]

Q. Was there any snow on the ground, Curly?

A. Yes.

Q. And when you got to the Alibi Club what did you do?

A. I got out of the cab and opened the door of the Alibi Club because it freezes shut. You always have to shove on it pretty hard to get it open. So I went back and got ahold of Miss Cathey by the arm and we went in.

Q. Where was she while you went to the door to get it open? A. Sitting in the cab.

Q. Was there any lights on at, in front of the Alibi Club at that time? A. No.

Q. Did you turn any lights on at the front?

A. No.

Q. And how did you take ahold of Miss Cathey when you went back to the car?

A. I got her by the arm and when she got out I put my arm around her and got ahold of her arm,

(Testimony of Leon D. Urban.)

underneath the parka there and we went in the bar. She said, oh, I don't want to go home now.

Q. Just a moment, we just want to get through the door now. Who closed the door?

A. I did.

Q. And what, if anything, did the cab driver do in [410] regard to helping her?

A. Nothing.

Q. And when did they, how long after he got to the Alibi Club was it before he left?

A. Well, he left right then. It was only a matter of seconds to open the door.

Q. As soon as you got Miss Cathey out he left?

A. Yes. I think he backed out before we had even got in the door, he was backed out of the place.

Q. So you state then there was no light on, no outside light on then burning in the Alibi Club?

A. That's right.

Q. What kind of a night was it, was it a dark night or moonlight?

A. It is always dark along in January.

Q. How long have you known the taxidriver that testified here the other day, Mr. Jennings?

A. Well, I never really knew him personally. I saw him in the place like all cab drivers he used to come in different times.

Q. And did you know him personally?

A. No, sir.

Q. When did you first see him?

A. Well, different times Mrs Cathey called for him.

(Testimony of Leon D. Urban.)

Q. How about, how many times had she called for him? [411]

A. Well, I couldn't say to that, but she rode cab twenty an awful lot.

Q. You say she rode with him quite a number of times, was that personal calls for Jennings?

A. Yes.

Q. Do you know where she would go when she went out with Jennings in a taxicab?

A. Well, different places. One instance the Birdland I remember, down at the Chinese Gardens. I don't know what they call it, the Northland now. Chinese Gardens, I know she used to go there a lot.

Q. Would, when she would go with him that time was it just a trip to a certain place?

A. Well, sometimes he would make a phone call out there and call for her and she would talk and she would walk out and meet him outside. I don't know what went from there.

Q. You know what some of those trips were for?

A. Well, there is always a man looking for a woman in the middle of the night.

Q. And that when Jennings would call her?

A. That's right. That cab is known for that. You can go all over town and ask.

Q. And if Miss Cathey was sober would she go with him? A. No. [412]

Q. Only when she was drunk, is that right?

A. Well, she was worth more. She was a good bartender when she was sober. When she was drink-

(Testimony of Leon D. Urban.)

ing better off to let her go where she wanted to get rid of her.

Q. You say she had a fine personality for tending bar? A. The best.

Q. How old was Miss Cathey?

A. Around twenty-eight, I believe she would have been twenty-nine in March I believe was her birthday.

Q. And about what was her weight, if you know?

A. Well, a couple of days before she was, before she got beat up she went and bought a weight book. I know she got weighed. She was going to go on a diet. She was a big eater. She was always going to go on a diet, but she would say, well, I will have one more meal first. She never did get on a diet.

Q. What was her weight when she got the weight book, do you know?

A. A hundred sixty-eight. Cost me a penny. I weighed two-forty.

Q. Now, after you and Miss Cathy walked into the Alibi Club, what happened?

A. Well, I went in behind the bar. We had, oh, a drink and then we probably had four or five more. We sat there for a hour or so and talked. Finally she got up and said, well [413] I am going to leave. I want to go out tonight. I am going to make a night of it, maybe I can make some money, so she just went out and slammed the door.

Q. And what did you do?

(Testimony of Leon D. Urban.)

A. Well, I cleaned up the bar, washed the bar glasses, went in and went to bed.

Q. About what time, to the best of your recollection was it, you went to bed?

A. Well, I couldn't say. It was probably between six and seven o'clock, something like that.

Q. And about what time was it that she left the place?

A. Well, a few minutes before that time, right in there. It took only about five minutes to clean the bar. I just washed the glasses up we had there. I also put them away at night.

Q. Where did you go, to go to bed?

A. In the Alibi. I just went in there and went to bed. There was heat on in there.

Q. You say you had the heat on?

A. Well, there is always heat there.

Q. Now, what kind of a door is there on the little room where you went in and went to bed, Curley?

A. Well, it is just a little room, a little door with glass in it and I used it for a storeroom and people used to look in there, so there some paint on sale, auction sale, so I [414] just went in and got a bottle of black paint and poured it on a rag, rubbed it on the glass. It still comes off, never has dried up.

Q. What, was that for the purpose so nobody could look into that bedroom?

A. That's right.

Q. When did you put that paint on?

(Testimony of Leon D. Urban.)

A. I opened the bar April the 28th, a year ago. I put it on in May after I was open a few days.

Q. How is that paint at the present time?

A. Well, it still comes off if you put your fingers on it.

Q. When was the last you saw any paint rubbed off of that?

A. Mr. Taylor used a Kleenex, just put it on there and it comes off.

Q. Now, how long did you remain in bed that morning after you cleaned up the bar?

A. Oh, I guess it was one-thirty or two o'clock. I heard a, heard somebody pounding on the front door and turning the knob, so I got up and pulled my pants on and went to the door. It was Mrs. Cathey.

Q. What was her condition?

A. Well, she had blood on the front of her all down the side of her face was all bruised, that is where the swelling [415] wasn't too bad yet. This eye was black, it wasn't black, it was red. Her lips was cut, cut pretty deep here and her mouth was cut, but she wasn't bleeding then. Dry blood on her face and hands.

Q. You say she had stopped bleeding?

A. Yes, sir.

Q. Now, at the time that you got out of the cab at when you went from the Players Club to the Alibi, Curly, did you see any blood on any garments of Miss Cathey?

A. No, but I do believe she had a little drop of

(Testimony of Leon D. Urban.)

nose bleed because her nose bled. It would stop quite often, blood come from her nose.

Q. Do you know what caused that nosebleed?

A. Well, she either bumped the cab or bumped me trying to get out of the cab. I wouldn't say for sure.

Q. And did you see some of that blood upon the, this exhibit here, these clothes?

A. Yes, there could have been a little on the inside where she, I believe she had it open going home because she sat in the bar with it open. I don't believe she zipped it up.

Q. On the inside?

A. Well, there wasn't very much blood on it. Going home I think she had a Kleenex in her [416] hand.

Q. Now, when she came in then was she wearing that garment? A. Yes.

Q. And you say that she, her face was bruised a bit? A. Yes.

Q. And otherwise what was her condition as to sobriety or drunkenness?

A. She was about half tight, and you could see her arms were bruised, when she took her coat off.

Q. She what?

A. When she took her coat off. She always took her coat off when she come in the bar, it was warm in there. She had a sweater on, I believe.

Q. Was she wearing a skirt or slacks?

A. Slacks.

Q. What? A. Slacks.

(Testimony of Leon D. Urban.)

Q. Notice any blood on the slacks?

A. No, I never saw any.

Q. Notice any blood on the sweater?

A. I never paid any attention, Mr. Taylor.

Q. Now, after she came in then, two did you say?

A. Well, it could have been a little later, little earlier, I don't remember the time.

Q. Did you look at the time, Curly? [417]

A. No, I didn't.

Q. Now, at any of these episodes that you have been testifying to, did you pay any particular attention to the time, look at the clock or anything that way?

A. No, I don't, I carried a watch for years, never knew the time. I always asked somebody. Time, never pay much attention to that.

Q. Now, what did you do or what did Miss Cathey do after she came in?

A. Well, she come in, I believe she went through her pockets and she said, you old bastard or something, give me a drink. She was always pretty jolly anyway, she says, I am a cash customer, I want to buy a drink, so she went through her pockets, she could only find fifty cents. She said, I am a cash customer now, give me a little drink, so I poured her a drink and she might have had two, and then she fell off the bar stool backwards.

Q. How was she sitting on the bar stool?

A. Well, she always sat up with her legs under

(Testimony of Leon D. Urban.)

on all the bar stools, or leaned back on them. She was a very active person, never sat still. She, when she sat in a chair she either had her foot on it or she would sit up with her feet on top of the bar stool. She had ahold the bar, she reared back, I guess her hands slipped or something. She fell off backwards and hit her head on the floor. [418]

Q. What kind of a floor was it?

A. It was a wood floor.

Q. What kind of a sound did it make?

A. It popped pretty loud.

Q. You mean it made a loud noise?

A. Yes, it might have been just a reaction.

Q. That the word you used in describing the episode to the highway cops?

A. I might have said popped like a cannon.

Q. What?

A. I might have told Sergeant Wirth it popped like a cannon. I am not exactly sure about that, said it popped, make a lot of noise.

Q. Where by a lot of noise would you clap your hands just illustrate how much noise?

A. About like that, like your head would hit the floor hard.

Mr. Taylor: And would the record show that he clapped his hands to illustrate the noise.

Q. (By Mr. Taylor): So that was about the fact you thought it was loud because her head hit the floor, is that right?

A. Well, that time of day it is still around any-

(Testimony of Leon D. Urban.)

way, there is no noise around and naturally it would make it sound louder. [419]

Q. What did you do then?

A. Well, I picked her up, took her in and put her to bed, took her clothes off.

Q. What, what clothes did you take off of her?

A. I just pulled her slacks off and her parka. I believe her parka was off, I won't say for sure.

Q. You took the parka off when she come in?

A. I believe she took it off when she come in. I won't——

Q. And then that was in the little bedroom off the room, next to the bar, is that right?

A. Yes, sir.

Q. And then what occurred?

A. Well, I said to her, I said, she was all right then, she began to talk, you know, kind of stunned her or something when she fell off the stool.

Q. She started to what?

A. I got her clothes off she began to grumble and say, well, I am all right now, so I went and got her a cold drink, I believe it was orange and grapefruit. We always kept that there. She drank a lot of that. I said, Pat, how did it happen. Oh, she said, I will take care of my own beefs, don't bother me. I said, well, we are going to have to call the doctor, I said, now are you going to tell that doctor when he comes. She said, I will tell him some woman beat me up. That [420] is the way she was about everything. That's all, let's get through with it.

(Testimony of Leon D. Urban.)

Q. And she told you that she would take care of her own beefs, what did you do?

A. I called a cab, called——

Q. What cab driver, if any, came?

A. Beasley, a fellow by the name of Beasley, drives for Vet's Cab.

Q. And then about what time was that, Mr. Urban, that you made that call?

A. Around four o'clock, I imagine.

Q. In the afternoon? A. Yes.

Q. And when you removed her clothing, what did you notice the condition of her body?

A. Yes, there was bruises all over, red marks there was then.

Q. Was that the reason you asked her what had happened?

A. Yes, I asked her on her face first.

Q. Did you ever learn from her who had beat her? A. No.

Q. Did you ever learn from her whether it was a man or a woman? A. No.

Q. Now then, you say Mr. Beasley came, is that right? [421] A. Yes, sir.

Q. Was any further conversation regarding her injuries at that time?

A. Well, we tried to pet her, get her to go in a cab with us to the hospital. She wouldn't go. She was sitting aside of the bed and Beasley said, well, I will call a doctor and he will come out to the base and he used to talk to her a lot, just visit because he don't drink much and him and I knew each

(Testimony of Leon D. Urban.)

other. He would make an errand, run the cab out and just talk to her so she said she didn't want no doctor. She didn't need a doctor, so he said, well, I will call, I forget the doctor's name that he was going to call, but his office is over by the Northward Building.

Q. Was that Doctor Weston?

A. Weston, that's right. She said, leave that phone alone and don't call no doctor. I will take care of my own doctor. She said, I don't need a doctor. I said, well the cab driver is here, Pat, we had better go. No, she said, why don't you get me a box of aspirins, some juice and a box of sanitary napkins, so that is where I went. I had him bring me to the Red Cross drug store down here so I picked up the aspirins, sanitary napkins and I stopped at the J & A grocery store and picked up two of them big cans of orange and grapefruit juice, two or three, I believe.

Q. Was Miss Cathey fond of fruit juices? [422]

A. Yes, she drank a quart a day. She used lots of it for a chaser and stuff, too.

Q. And you stated a few moments ago that she was a very heavy eater? A. Yes.

Q. Now, how did you go to town that time, Curly?

A. In the same cab. Mr. Beasley that I called out to take her to the hospital.

Q. Where did you call the doctor from?

A. Well, the Alibi Club after the cab driver brought me back.

(Testimony of Leon D. Urban.)

Q. And did a doctor come?

A. Later on in the evening.

Q. What time?

A. I don't remember, seven or eight o'clock, something like that.

Q. And what doctor finally showed up?

A. Doctor Anderson.

Q. What? A. Doctor Anderson.

Q. And what, if anything, did he do?

A. Well, in the meantime before the doctor come, while we was out after the aspirins and the sanitary napkins, she had got filled up on whiskey, in the meantime.

Q. She did what? [423]

A. Had filled herself up on whiskey. She had got out to the bar and took three or four more glasses of the, whatever bottle was left on the bar.

Q. When did that happen?

A. That was when we were gone in the cab.

Q. She was there alone? A. Yes.

Q. How long were you gone? *

A. Ten or fifteen minutes, not very long, ten minutes, probably.

Q. So what was her condition then when you got back A. She was drunk.

Q. And how long after you got back was it before Doctor Anderson arrived?

A. When I got back, that is when I called the doctor. She was already drunk and laying on the bed so I just went and called the doctor.

(Testimony of Leon D. Urban.)

Q. And then how long was it after you called before he arrived?

A. I imagine an hour and a half or so.

Q. Who bought the doctor to the house?

A. He come in his own car, I guess.

Mr. Taylor: He came in his own car. Could we have the recess, your Honor?

The Court: Very well. It is eleven o'clock. Members [424] of the jury, once more I admonish you not to discuss the subject of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject of the trial; and do not form or express any opinion until the case is finally submitted to you. Take a ten minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:00 a.m., the Court took a recess until 11:15 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: The parties wish polling of the jury?

Mr. Taylor: We will stipulate that the jury are all present.

Mr. Stevens: We will stipulate also, your Honor.

The Court: Very well, you may proceed.

LEON D. URBAN

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

By Mr. Taylor:

Q. Mr. Urban, I am going to revert back a little bit. I want to try to keep everything up to the, bring it all forward at the same time and I just overlooked asking you one question. Now, when you got, you and Miss Cathey arrived at the Alibi Club in the car driven by a man named Jennings, after you [425] opened the door, why did you go back to the car and take her out of the cab?

A. Well, she didn't want to go home right then.

Q. And for that reason you did take her out of the cab?

A. I just got her by the arm. She slid out, I put my arm around her, the other arm and went on in.

Q. Also you heard Mr. Jennings testify that you had slapped Miss Cathey while you was in the cab?

A. I did not.

Q. What?

A. I did not. Well, I didn't slap her.

Q. Did you throw her down on the floorboard and step on her?

A. No, sir, she was too big to go between them if you want to measure. I don't believe she would fill in between there like the cab driver tells. She wore a fifteen and a half shirt.

Q. A big woman?

(Testimony of Leon D. Urban.)

A. Yes, wore an eighteen jacket.

Q. Now, after Doctor Anderson got there, who else was present? A. That is all.

Q. What? A. Just the Doctor.

Q. And you? [426] A. Myself.

Q. And what did he do?

A. Well, he looked her over and he looked her lip over and he took a needle and put some stuff in it.

Q. Just a moment, let this put-put.

A. He gave her a shot in the lip, whatever you want to call it, first.

Q. Wait a minute. Now, start that over.

A. Well, he just looked her over and he took some stuff and he cleaned her lip and her mouth all over, cotton, alcohol, whatever he uses, and that is when she said leave me alone now, don't bother me.

Q. Just a moment. Is the jury hearing that?
O. K., continue.

A. So then the doctor got his needle and he give her a shot in the lip and got a needle and he looked through and he didn't have no thread with him, so I had a spool of thread there on the little, well, it is a little cabinet, so he took a piece of that and put it in disinfectant and sewed her lip up. I don't remember if he put three or four, three little stitches here. I believe, and then on the inside he put a few there. I wouldn't swear how many, so then when he got that sewed up, while he was doing that she said leave me alone now, don't bother me,

(Testimony of Leon D. Urban.)

go away. So then we got all through, he took and looked her all over, looked her over for different things [427] and looked at her feet and then he give her a shot of penicillin in the rear, on her hip, on the hip or the leg. Well, he said, if she is not all right give me a ring and so the next morning she is up and around and then, oh, I believe Wednesday I called for some, called in and she wanted some sleeping pills. She said she might need one, she had one left, so I called him and I went down to Williams. I was waiting when the phone call come in. I picked the sleeping pills up, I left them lay on the front of the cash register so I was out at the base that day, hauling some, I bought some beds and mattresses out there and some tables, so we hauled them in. I brought them in and when I went in I seen she had been in this bottle. She never touched the one sleeping pill she had in her room, so she took one out of the——

Q. What bottle you refer to?

A. The one I got from Williams at the drug store.

Q. I will hand you Plaintiff's——

The Clerk: Defendant's, it ought to be——

Q. (By Mr. Taylor): Sure looks like Plaintiff's, but I will call it Defendant's Identification A, and ask you if you have seen that before?

A. Yes, I signed for it out there, when I picked them up I signed my name on it.

Q. Sign where? [428]

A. At the drug store where you get it.

(Testimony of Leon D. Urban.)

Q. Williams Drug Store? A. Yes.

Q. Is that the Doctor, then?

A. Yes, the Doctor made a mistake. When he was out, sewed her lip up, he asked me her name and I told him her name was Myrtle Cathey, and when I called in I know he made a mistake here the same as he did when he went to the hospital that night. He didn't write it down, so when he called at the hospital to take her to the hospital that night he made, he still called it Myrtle Kelly or whatever this, that is the way it was registered at the hospital, so I went and told them her name was Myrtle Cathey and then at the hospital they started to spell the "k" and I said, no, it is c-a-t-h-e-y.

Q. That is the prescription?

A. Yes, I picked it up.

Q. Prescription that you picked up at Williams Drug for Miss Cathey? A. Yes.

Mr. Taylor: If the Court please, we would like to have this introduced in evidence as Defendant's Exhibit No. 1. That is what I am moving, that it be admitted in evidence.

Mr. Stevens: No objection.

The Court: It will be received.

The Clerk: Defendant's Exhibit No. 1. [429]

(Defendant's Identification A was received in evidence as Defendant's Exhibit No. 1.)

Q. (By Mr. Taylor): And what day was that after the doctor had been at the Alibi Club to see her?

(Testimony of Leon D. Urban.)

A. Well, I believe that was Wednesday. I won't swear to it, but I know he wrote it down there on the book out there when I signed my name. We could check exactly what day and the next day is the day that she took the stitches out of her lip.

Q. How long was that after she had received these bruises?

A. Well, the doctor had sewed them up on Saturday. That would be the 22nd, and he said whenever the stitches got loose, if we didn't take them out come on over and call him, he would take them out. She stood at the bar and cut them out with her toe-nail clippers and took the, either two or three out of her, pulled them out and she couldn't get this one out down here so she held her lip down and I cut it out. She pulled it out herself.

Q. That was at the bar mirror, is that right?

A. Yeah.

Q. Now, during that time from the doctor came until you took those stitches out, what was her condition, Curly?

A. Well, she was all bruised up. She would get up and the first two or three days she did drink a lot of whiskey around there. I give her a Tom Collins, anything she wanted, [430] or she made it herself. She would get up because I wasn't there all the time. The, it only takes about an hour to run with the pick-up to, out to Ladd and bring back some beds and stuff and then I would go in and see how she was and she was always sitting up around there, and she read some there. Her one eye was

(Testimony of Leon D. Urban.)

practically closed but she could see all right out of it. The next day it was all right, it was swelled shut, but she could still see and she cooked with an electric frying pan there all the time, anything she wanted to eat. The first day we had stewed chicken there, I fixed some chicken up.

Q. Who fixed the chicken?

A. Well, I oiled it all up and she come out to the bar there and I and her sat there and had boiled chicken and we had some noodles in it.

Q. And was that from the day after, was that started Sunday, was it?

A. Well. I took that, started it Sunday night.

Q. Was that when you had the stewed chicken?

A. Well, it would be Monday morning, about four o'clock we had.

Q. And then thereafter who did the cooking?

A. Well, different times she fried herself eggs, bacon, stuff like that, whatever she wanted. Sometimes she just had milk with toast in it. She would take browned toast, put it in the milk. She liked egg on top of that. She always [431] eats something like that.

Q. Where did she get this food stuff, Curly?

A. We always kept food at the Alibi. We always do.

Q. Did you do any cooking? A. Oh, yes.

Q. And was she able to walk around and——

A. Yes, she went to the toilet and everything herself, and around and I think it was Monday

(Testimony of Leon D. Urban.)

afternoon I was at the base when she was up and around and then she took the dried blood was up in her nose, she picked that all out and everything. That was Monday I guess she done that.

Q. And did she do any other work besides a little cooking for herself?

A. No, that is about all she done around there. I guess she did, she soaked her panties and brassiere out there one day.

Q. She did what?

A. She soaked her panties and stuff out, washed them out in the sink in the ladies rest room there.

Q. And did you keep the bed, the Alibi Club open during that time?

A. Well, I opened up Friday evening for a little while and Saturday evening for a little while because there was people coming around on the sale, collect their money for the sale before and we hadn't had a sale for about ten days or [432] two weeks and different people would call so I just let them in, served a few drinks. I guess I was open Friday night about three hours. There ain't much going on in the wintertime like that. If you opened up at five and closed at nine you would get about all the business you would get anyway.

Q. During that time following her injuries did she do anything in regard to the surplus business?

A. Well, she answered the phone. Regardless of when the phone would ring she would get up and answer it. She always answered the phone. There is an extension phone on out in the sale building

(Testimony of Leon D. Urban.)

and one in the bar, all on the same number. She must have answered the phone at least twenty or thirty times a week. You could go out and sit there any day in the afternoon and it will ring four or five times wanting to know if you got a bed, or if you would sell a chair, or if you would look at furniture. There is all kinds of things they would call for.

Q. Were those calls then, Curly, from prospective customers?

A. Yes, some was wanting to sell and she just wrote the phone number. I never even called anybody back. We are not buying in the wintertime. The lady that works down at the store, she called out there two or three times a day.

Q. What lady is that?

A. Marian Hathaway. I can't pronounce her last name. [433] She has a German name, but I know she has taked to her.

Q. Marian what?

A. I can't, I can't pronounce——

Q. Would it be Hetherington.

A. Hetherington.

Q. Where does she work?

A. She works for me down at the surplus store on Third Street.

Q. Did she have calls to make to you at the Alibi Club? A. Yes.

Q. During the period that you were hauling in stuff from the base, do you know whether or not Miss Cathey answered the phone?

(Testimony of Leon D. Urban.)

A. She, yes, because one day I come in and Pat told me to call the store, that they wanted me down there. I don't remember just what it was now. Wanted to know if we had some large parkas out in the warehouse out there.

Q. Now, did you have any occasion to call Doctor Anderson other than to get the prescription for Defendant's Exhibit 1?

A. Yes, on Sunday she wanted me to rub her back and she was laying on top of the sheets. No covers over her. The room was warm so she said, Pop, rub my back, so I was humoring her a little bit so I got ahold of some of that dermatol, that white, something like linament, it is a kind of a new [434] stuff out and rubbed her back good. She had it there for her hands. She always used it on her hands, keep the water from making her hands crack. She used it there. The bottle is still out at the place. So I am rubbing her back, she said, pull me down on the bed, so I pulled her down on the bed. She said, I want to look up a little higher at the ceiling. She was very active. So I pulled her back down a little further and I started to rub a little bit, about in the middle of the back, and she said, look 'a there. She rared up and pulled her head up, said I want to look higher, pull me down some more. That is when she pulled her neck up and it popped.

Q. What kind of a noise did that make?

A. It made a terrible noise, just pop like that. Might have been a vertebrae or something.

(Testimony of Leon D. Urban.)

Q. Could you tell from what part of her body that noise came from?

A. No, but she said, I don't feel good. That is when she said, I don't feel good then. That is when I called Doctor Anderson. I said you come right away, there is something wrong with her, so when he got there he looked over, she was breathing kind of hard. He give her a shot in the arm, I don't know what he gave her, so she went right to sleep. He said well, she will be all right, call the ambulance. Better call the ambulance, so I, I don't know if I called the ambulance or he did. I remember I got on the phone, or I [435] didn't, I didn't know the ambulance phone, I looked there by the police calls and got it. I guess I called, so just as the ambulance drove up the Doctor was leaving, so we took her to the hospital and went over to the, I rode in the ambulance to the hospital so we went in there and I imagine in thirty minutes or so before they ever got her to a bed. So they got her in the room there, I believe it was 305, so then they put a bottle, dripped there for her. I was holding her arm. I held her arm all through it.

Q. What kind of a bottle was that?

A. Kind of a blue looking water in a bottle, put it in her arm with a needle. So I held her arm so she was kind of choking and I went and got the nurse. So Mrs. Bray come and they brought a machine they used to pump her throat out with. They couldn't get no rubber on the end, worked on that trying to get it together, I and her. She finally got

(Testimony of Leon D. Urban.)

a piece of rubber on it so they could put it down in her throat, pump her throat out so she left.

Q. Just a moment. Did you see what, whether they got anything out of her throat or not?

A. Yes, they pumped blood and saliva, thick stuff out of it. In the morning when she woke up her throat would be full of saliva. She would have to cough and spit until she got it out. Always thick pieces come out of there. [436]

Q. See any blood in that phlem the time she went to the hospital?

A. No, I never notices. She always put it in Kleenex.

Q. They get, how much of that phlem did they get out of her throat?

A. Well, she pumped quite a bit, it goes in a big jar. I didn't have no idea how much. Then Mrs. Bray was busy, I think that was the fourth baby born while she was there, third or fourth, so another lady come by and I said, this lady is choking so she turned that little button and pumped her throat out again, so Mrs. Bray come back again done it herself and then there was a little nurse, I believe it was the little nurse on the stand, I don't know her name.

Q. That Miss Oswald, the young lady that testified here?

A. I believe she pumped her when she come on shift then. It was either her or the other girl at the desk, because three zero five was right close and I went over and asked her, I said, Pat is choking

(Testimony of Leon D. Urban.)

again, and they went back in and pumped her throat four times. She kept choking up. She couldn't breathe.

Q. Was the doctor there during that time?

A. No, they called for the doctor. I asked again, has the doctor showed up, so I said I will call again, Mr. Urban. I know they called the doctor two or three times. I won't swear because I was there when she called the second time. [437]

Q. How long before the doctor got there?

A. Well, she passed away and it must have been twenty or thirty minutes before the doctor got there. I wouldn't say. It was quite awhile. It seemed a long time to me.

Q. You remember the hour Miss Cathey died?

A. Well, it was a little after one o'clock.

Q. And was the doctor there at the time of her death? A. No.

Q. And he had requested to put her in the hospital? A. Yes.

Q. Now, Mr. Urban, at the time that Miss Cathey went down to the hospital or at that time the ambulance took her down, what was the condition of her face?

A. Well, it wasn't made up or anything, but it was, her face was clean. There was no dried blood in her mouth or anything. There might have been a scab underneath here on her lip where it was damp.

Q. Mr. Urban, I will hand you photo No. 1 of Plaintiff's Exhibit G and ask you to state, take a

(Testimony of Leon D. Urban.)

look at that and ask if that is a picture of Miss Cathey? A. Yes.

Q. And the time Miss Cathey went to the hospital, what was the condition of her mouth?

A. Well, it was all right. There was no dried blood on [438] it. This here blood on the bottom of her lip was on it, kept a wiping it off at the hospital. I wiped it off there with, I borrowed a Kleenex from that little lady next to us that was in the hospital.

Q. That blood that shows on that picture then was blood that was brought up by the suction machine? A. Yes, it can't be the old blood.

Q. Did you see Mrs. Cathey after she passed away? A. No, I didn't.

Q. Did you see her before she was taken to the funeral parlor?

A. Well, I was in the room when the nurse asked me if she had any religion. That is when she passed away. That is the last I saw her. .

Q. Did you go to the funeral home?

A. No.

Q. And so that blood was on her face then when she left the hospital?

A. Well, I don't know. When, when they was pumping her throat out they brought up blood and saliva. It was on her mouth. She had stuff come up. I was wiping that spit and stuff away when they was pumping her throat.

Q. You stated none of that discoloration was on her when she went to the hospital?

(Testimony of Leon D. Urban.)

A. No, no dried blood at all. There might have been a [439] scab on her lip where she was sewed up.

Q. Now, after Miss Cathey passed away, what, if anything, did you do?

A. Well, the doctor was, when he come then I said, well, I should wire her mother, it is down in Montana, but I didn't know the town or her name and so he put down on a slip passed away certain time and I sent, I had to get a cab and I went home and got a letter she had got from her mother, so she never wrote to her mother probably about once a month, sometimes not. She only got a couple of letters from her mother while she was out there. She would, she wrote, different people all the time but she only wrote to her folks once in awhile, so I brought the letter back to get the address, Dagmar, Montana is where her mother lived.

Q. Where did you take that letter?

A. Well, I give it to the police station and then I sent a wire to her mother.

Q. Did you have any talk with the officers at the hospital or at the police station?

A. Yes, with Goodfellow.

Q. Where did you have that conversation?

A. Well, him and the nurse was there, so he called me out and, the nurse called me out, said they would like to have a statement. Well, he said, how did she get beat up. I said, well, all I know is a woman, a woman or something, woman [440] beat her up. I only knew what Mrs. Cathey had asked

(Testimony of Leon D. Urban.)

me to tell so that is all I told them. I believe Mrs. Bray was there all the time, too.

Q. Following that what did you do?

A. I went, when I went to the police station then Sergeant Wirth and Goodfellow was there and they asked me and I told them. First Mr. Goodfellow up there he said, well, do you think she will sign a statement. I told her I didn't believe she would because she already said she wouldn't sign any statement out to the place there when I was going to call the doctor and I wanted to find out who had done it. She was always afraid of asking, of something coming against her name on the license, too, and her folks find it out. So then Sergeant Wirth and Goodfellow asked me at the police station and I told them all I knew about it. That's all I told them, that she had said that and then I just went on home and went to bed.

Q. What time was that about?

A. Oh, it was probably three-thirty in the morning, three o'clock.

Q. And then did you have any further talks with any of the officers?

A. Yes, on the 4th of February.

Q. Who did you have the talk with and where?

A. Sergeant Wirth and Goodfellow come out to the bar. [441]

Q. What time of the day was that? .

A. That was in the evening around six o'clock or something. I don't remember, wouldn't say what time it was because I am not certain, so I talked to them in the back room.

(Testimony of Leon D. Urban.)

Q. Did they ask you what this, tell you what this statement was for?

A. Well, they asked me if I wanted to give a statement or to help them out in anyway to see if they could find out who done it or anything, and I told them I would be glad to help, anything I could do.

Q. What did you tell them?

A. Well, I just told them what I presumed, thought it was right. I mean——

Q. Did you tell them the same story you told Goodfellow in the hospital?

A. No, I told them that I wasn't sure but what I knew about it, I wanted to tell them what I knew about it. I did change in a way, or I added onto it from, Mrs. Cathey had asked me to go and say that about woman beating her and she never would say if a woman or a man did beat her.

Q. And is that all you told these officers?

A. I told them about taking her home.

Q. And what time did you tell them that she had left after you took her home from the Players Club?

A. Oh, I guess around seven o'clock or something like [442] that in the morning, might have been six-thirty, I won't——

Q. Did you tell both the officers that you left there around six-thirty, seven o'clock?

A. Yes.

Q. To the best of your recollection were they together when you talked to them?

A. Yes.

(Testimony of Leon D. Urban.)

Q. Did you have a private conference with, or conversation with Wirth?

A. Well, I just, Mr. Goodfellow asked him, I said I would rather talk to Sergeant Wirth than I would to you. He seemed kind of sarcastic. That is why I talked to Sergeant Wirth just a second. Sergeant Wirth asked me, they asked me first if I would go to the highway partol office and see Lieutenant Mayfield, I believe he is a Lieutenant, so that is when I asked this Sergeant Wirth. Talked to him then at the Alibi Club just a second. I told him I would go down if he was going along, so I rode down with Sergeant Wirth.

Q. Did they state why they wanted you to go to the Territorial Police Office?

A. Well, they said they just wanted to find out if anything I knew would help them.

Q. And you had already told everything you knew, had you? [443]

A. That's right.

Q. Then you went down to the police office?

A. Yes, sir.

Q. Did they state that you were under arrest?

A. No, sir.

Q. Did they state that anything that you say might be used against you?

A. Well, he did say that so I told them what I knew. That's all I can say.

Q. You had no objection then to telling everything you knew about the matter?

A. No, sir.

Q. And who was present when you got to the Territorial Police office?

(Testimony of Leon D. Urban.)

A. Well, Mayfield was there and Sergeant Wirth and Goodfellow. That's all.

Q. And what if anything did you tell them there?

A. Well, I just told them there how he got home, but I told them I would have to see my attorney. He asked me if I would take one of them tests. I don't know anything. I never saw one of them. I don't know what he is talking about.

Q. So did you tell Mr. Mayfield that this happened on the 21st of January that the, that she got hurt on the 21st of January?

A. No, I didn't. [444]

Q. Also did you tell him that Miss Cathey had returned to your, to the Alibi Club at seven o'clock in the morning?

A. No, sir.

Q. And how long were you there that night, Mr. Urban?

A. Oh, about twenty minutes, I imagine.

Q. And did you have any further conversation?

A. No, Sergeant Wirth took me home.

Q. Did you ever hit Miss Cathey?

A. No.

Q. Have you ever slapped her?

A. Well, we have had scuffling match one in awhile, not much. She was lots of times just playing, too.

Q. And you heard the testimony of the water, the iceman, Mr. Meyers?

A. Yes, I did.

Q. Could you explain that occurrence when he says you knocked her off the stool?

A. Well, I don't ever remember anything happen like that, but I would like to know who was tending bar. If I had been in town and she was sitting on the

(Testimony of Leon D. Urban.)

outside. It is a known fact that he is drunk all the time driving that truck around the road. I think if you check back.

Q. Just what, what explanation do you have for him making that statement?

A. Well, I believe that covering up for, I talked to the [445] boss out there night before last.

Mr. Stevens: Just a moment, I object to any conversation.

The Court: Sustained.

Mr. Taylor: I don't think there is any objection.

The Court: He said he found out, he was talking to the man that runs the ice station.

Mr. Urban: That's right.

Q. (By Mr. Taylor): So would you state whether or not you did around the time testified to by Mr. Meyers knock her off a stool?

A. That I know I didn't.

Q. He was a little indefinite in his time, he couldn't put any particular date, but any time after New Years, did you knock her off a bar stool?

A. No, sir.

Q. Did you hit her or strike her at the Players Club on the morning of the 22nd?

A. I did not.

Q. Or in the cab going from the Players Club to the Alibi Club?

A. No. The only trouble we had in the cab is trying to hold her. She wanted to jump out of the cab. She didn't want to go home. She wanted to go out.

(Testimony of Leon D. Urban.)

Mr. Taylor: If the Court please, I was going into a [446] little different line of questioning and I don't like to start at seven minutes till twelve. I wonder if we could take the recess at this time.

The Court: It is about five minutes until twelve. I see no objection. Now, you gentlemen want to be in Court at one-thirty on the motion?

Mr. Stevens: Yes, sir.

Mr. Taylor: Yes, sir.

The Court: Members of the jury, once more it is my duty to admonish you that it is your duty not to discuss the subject matter of this trial with anyone; not to permit anyone to discuss it with you; and not to listen to any conversation concerning the subject of the trial, and do not form or express any opinion until the case is finally submitted to you. You are excused until two o'clock. Court will recess until one-thirty.

The Clerk: Court is at recess until one-thirty.

(Thereupon, at 11:15 a.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 1:30 p.m., pursuant to the noon recess.)

The Clerk: Court has reconvened.

Mr. Taylor: If the Court please, the defendant moves to strike the Exhibits, Nos. 1, 2, 3, 4, 5, and 6, the [447] Plaintiff's Exhibits. Now, your Honor, I

can honestly say that I did not think those exhibits were put in evidence because I looked up some law on them, didn't think they was admissible and I was waiting for them to be offered so I could make the timely objection and I think there is enough evidence, your Honor, that the Court should on its own motion strike these exhibits which are, may have been admitted in evidence. It was entirely without my knowledge and it was due perhaps to attitude of the District Attorney, have all of them identifications and then throwing in fifteen or sixteen identifications all at one time before a person can check them to find out what they are, why it's in and so I particularly marked these exhibits for objection.

Now, first question is, your Honor, that the exhibits are duplicates of pictures already in evidence and it is only going to clutter up the record to have more pictures in. I don't see that they serve any useful purpose. In fact, I think they would serve a very serious purpose in that, for the sole purpose of this, of these enlargements, your Honor, is to arouse in the hearts of the jury an animosity toward the defendant. In that respect, Wharton on Criminal Practice, Section 456, Page 816 says, citing the case of *State v. Moore*, 120 Pacific 472, says the production of real evidence should not be permitted to exaggerate and should not be allowed through cunning presentation to stir the passions or unduly [448] excite sympathy or pity and cause the jury to act upon sentiment instead of prudence.

Now, the prosecution, your Honor, went to quite

some considerable, considerable extent to get these pictures in evidence after the original contact photographs, your Honor, have been introduced in evidence. The picture, those are in evidence. Now, in this case, your Honor, the photographer himself says that a different paper was secured by the officers for the purpose of making a darker photograph of the bruises. It would make them a darker picture. Now, that practice, your Honor, I believe should be frowned upon by this Court. So we have duplicates, while they are not true duplicates, in evidence; and we think that those pictures, your Honor, as testified to by the photographer, do not show all of that part shown in the contact pictures but they pick out a particular part of it and accentuate that, blow it up so part of the picture is left out and it is not a true enlargement of the original. And also call the Court's attention to the fact that the government arrested before these pictures, the government rested before these pictures were offered in evidence. There must be a witness on the witness stand to offer exhibits, or offer those in evidence.

Now, your Honor, the picture, one picture here, the evidence is that that discoloration around the mouth was, occurred in the hospital. It was, the picture was taken in [449] the morgue but it occurred in the hospital when they were extracting the phlem which was discolored with blood from the throat, so that is not a true representation of this woman in real life. This was taken at the morgue after her death and something that occurred in the

hospital, your Honor, should not be allowed in evidence in this case. That would apply also to the other picture here in the contact pictures.

Now, your Honor, that is certainly not a true enlargement of the picture. I cannot see anything blocked out there on the contact picture and, your Honor, also I think if the Court will examine these and examine the contact pictures, your Honor, you will find that the, these bruises are unduly accented and for only one purpose, to arouse the sympathy or the violence and prejudice of the jury. Now, your Honor, we have this picture, we have the original picture, blocked out. That is not a true representation, your Honor, by any stretch of the imagination. Why is that done? That is why I would object, not knowing, to the introduction, because I did not know they had been introduced into evidence. Now, that is not true, that is something, your Honor, that was done at the hospital.

That one, we have the, a great deal of objection to that, your Honor, but if you will compare that with the original contact picture you will find that this bruises are accentuated and they are accentuated to the point that they [450] would fall within the rule just mentioned of Wharton and in the Moore case, as to allowing them to be, to go into, go before the jury. And the same here, here is something put in here, that is not the true picture, your Honor, as to the contact picture that was made. Only for the purpose of prejudice. Because what purpose could these pictures serve that the other, these pictures could not serve and I want to call the

Court's attention to the testimony of the photographer. He says that all of the pictures that is shown in here, some of it has been cut out on some of these pictures so that it don't enlarge all the picture that shows in the, in these pictures, your Honor. I think it comes to a sad state when the government has to attempt to prejudice the jury by bringing in these enlargements that are retouched as the photographer says they are retouched to show that the bruises are darker than they are on the contact pictures, and they should not and they have got those patches pasted over, your Honor. They are not, these are in, there is no patches on these. Why would that be?

I want to call the Court's attention to another fact. The defendant rested at the time that these matters were, these pictures were put into evidence and if they have not been put in evidence, your Honor, I had no opportunity to cross-examine any of the witnesses who had participated in those, in taking those pictures such as Sergeant Goodfellow. I did cross-examine the photographer, I forget his name now, he is a News-Miner [451] photographer and he was the one that admitted they got a certain type of paper so the bruises will show. He was the one that says there was a discoloration on those pictures and he was the one that said changes, had made some of what appeared in the contact exposure would not show in that, so we were, your Honor, was deprived of an opportunity of cross-examining Goodfellow and Wirth and several more. The fact that the pictures was not put in at

the time they were identified by Goodfellow. At that time we would have certainly made a strenuous effort to keep them out, your Honor, because we think they do come within the rule as stated by Wharton that they are superfluous. They are prejudicial and purposely so. For the purpose of prejudicing this defendant before the jury. So without those being in evidence, your Honor, I had no opportunity to cross-examine anybody outside of the photographer regarding any pictures and that was only as to paper and how he took them. If these are going into evidence, your Honor, I am going to have to recall every witness that the government has had so far, because I had no opportunity to cross-examine them about these pictures.

The Court: Mr. Stevens:

Mr. Stevens: Well, in view of the absolutely false recollection of Mr. Taylor, I don't see any reason to argue the matter, your Honor. I could recall for the Court the fact that the witness was on the stand and I made the motion [452] to enter the identifications into evidence and Mr. Taylor made an objection from the counsel table. Then he wished to make the objection out of the hearing of the jury that they were prejudicial and would inflame the jury, so we went to the bench and Mr. Taylor made that objection there and the Court overruled the objection and admitted these large photographs first. Mr. Taylor said then that if the smaller ones were admitted so that they could compare them to show how we had attempted to prejudice the jury he would have no objection. I

said on that basis we will admit them. The Court will remember that the Court did admit the small photographs so there would be a comparison if that is what Mr. Taylor wished. There has been no alteration of those large photographs; there has been no distortion. Mr. Douthit testified there is a normal distortion that comes about on any photographs on the periphery of any photograph enlarged. Those extra pieces of paper we will move in a minute. They cover the private parts of the deceased woman. They were put there for the specific purpose of making them more likeable, less disagreeable is a better way of phrasing it, I take it. But the first ground, they are duplicates of pictures already in evidence is false. These pictures were in evidence and the little ones came in later on Mr. Taylor's own motion.

That the exhibits are not true and correct enlargements of the negative photo is not true. They are true and [453] correct enlargements but the thing is, Mr. Taylor fails to see that an enlargement necessarily is not the same as the original when the sizes are different. Now, the sizes of this paper, the size of this paper and the size of the little paper is mathematically such that the full pictures from the little paper could not get on to the big one at that range when they develop it. The outside portions are portions of the mortuary that do not show on that. Mr. Drouthit readily admitted it.

No witness was on the stand at the time of admission. There is no argument necessary on that.

The record shows otherwise. That the exhibits were offered too late for the defendant to cross-examine the plaintiff witnesses regarding the same. Mr. Taylor cross-examined Mr. Goodfellow. He cross-examined Mr. Douthit and the Doctor and I call your Honor's attention to the Doctor's testimony which has been transcribed and the Doctor stated very definitely that these were fairly representative of the condition of the deceased and one time, on page 15 if your Honor has a copy of that transcript, the Doctor said there is some difference, the stain that was beneath the shoulder blades does not show up. In other words, by the Doctor's testimony some of the stains that were visible on the deceased's body are not visible here. Certain parts of the original picture were unduly accentuated for the purpose of inflaming the minds of the jury That is absurd because Mr. Douthit said there is no accentuation, it is a different type of paper and will accentuate detail. He said he did not [454] accentuate any particular portion of the body, any particular portion of the photograph. He merely reproduced the proper photograph on the only paper of that size which was available.

We are not seeking to commit error on this thing. This is strictly a matter within the Court's discretion as I take it. We would cite the Court the case of *State vs. Hines*, 275 Northwestern Reporter, begins at page 10. On page 11, on page 16, the Court discusses some photographs taken at the funeral home. The same situation that we have here and they were readily identified. They said there

is nothing to indicate the exhibits were not fair representations. We find no reason for saying there was error in admitting the photographs into evidence. Those weren't enlargements as far as I can tell from the text. In *State vs. Hause*, this is 130 Atlantic at page 743, on page 744 the Court discussed the relevancy of the photographs taken of the deceased. The objection was that they were distorted, that they were enlarged and the Court stated definitely the photographs were enlargements. This did not make them distortions and the original ground of the objection in that specific regard is based upon the unsupported assertion of counsel and requires no attention. It went on to say, "If the stated ground of distortion implied a general ground of prejudice, whether they were unduly prejudicial or not was a question of fact to be determined in the Court's discretion." Then it cited some cases. "If it can [455] be said that discretion might have reached a different result, it cannot be held that it necessarily ought to have. It is not to be assumed that the photographs were red flags necessarily arousing the jury's passions and a will to avenge. Since they were relevant, their probable importance was to be compared with their probable prejudicial effect on the inquiry whether they would do more good than harm, and the finding that they would is a reasonable one."

The case of *Vaughn vs. State*, 183 Southern, page 428. Again on page 420 discussing photographs of the deceased on the ground that they were prejudicial and immaterial the court stated, "If the

photograph was wholly immaterial, and its introduction was merely to arouse sympathy and worked prejudicially to defendant's interest, then the case of *Birmingham Baptist Hospital vs. Blackwell*, 221 Ala. 225, 128 So. 389, would have field for operation. But such is not the situation here presented. The body of deceased was in 'a very bad state of decomposition,' and 'the frontal part of the entire head was crushed * * * open wounds around her cheeks and her lips were swollen and lacerated.' The photograph, not here produced, had a legitimate place as a matter of identification, and it was also referred to by witness McDaniel for identification and witness Parker, who had never known deceased, identified her from the photographs as the woman he saw at Greenwood's on the fatal night. The objection to the introduction of the photograph [456] was properly overruled."

We offered these photographs on the question of identification and also on the question of the nature of the wounds. The case of *State vs. Lantzer*, 99 Pacific 2nd, Page 773, that is page 73, not 773. The Court, it is Wyoming case, the Court discusses both *Wharton* and *Wigmore* and states: "We assume that photographs should be excluded when they do not tend to prove any controverted fact, but have a tendency to creat unfair prejudice, on the same principle that, under like circumstances, authorizes or requires the exclusion of bloody clothing of the deceased, or instruments used by defendant in committing the crime." "The photographs in question merely gave the jury a better description than

could have been given by words. They cannot be characterized as gruesome or inflammatory. The body of the dead woman lay on its back hiding the wound and blood. We cannot hold that the photographs had such a tendency to create unfair prejudice that it was the duty of the court to exclude them from the evidence."

To a like holding is *People vs. Smith* at 104 Pacific Second, page 510. In that there were photographs of the deceased's body as the deceased body was view immediately after the killing, and the Court said, on page 515, "they possess evidentiary value and tended to clarify the evidence theretofore presented by several witnesses concerning the position of the body in its relation to the gun and the other [457] pertinent objects found on the floor after the homicide. The admission in evidence of the photographs was within the trial court's discretion, and clearly were not erroneous." Now, there might be something erroneous here if we assume that I have offered both sets of these photographs in evidence, but I have not offered both of these in evidence voluntarily. I offered the second set because Mr. Taylor wished them, but cumulative evidence showing the same thing would be prejudicial. We selected the large ones because we thing it clearly shows the identify. The Doctor examined the one which Mr. Taylor says is clearly immaterial and says that shows this tattoo on this woman's leg. That is clearly the same body. Now, he had seen that scar and he knew that was Myrtle Cathey. Identity is certainly one large issue in a murder case.

Likewise, the identity and nature of the wounds. This case we are basing it on the proposition that a greivous assault which was calculated and which did bring about great bodily harm and death caused woman's demise and certainly we, when we look at those photographs you can see the extent and the nature of the wounds. You look at the small ones and it is true you can't tell it as clearly and it is clear they are not as clear. Again I state to the Court, I mean this sincerely, if the Court in its discretion feels that those photographs are prejudicial then strike them out because we want nothing prejudicial in this record.

Thank you.

Mr. Taylor: If the Court please, I think the contact [458] pictures are the pictures that should be put in first if you are going to allow enlargements because they are the only true pictures. These others that come in along, they they blown up, the Doctor says, the photographer says they are distortions. They don't show all the things that is in the pictures and is there anything in regard to the contact pictures here that cannot be shown by, everything to be shown by these pictures that are on those. In fact, more. They got part of that covered up. All the bruises can be seen on here. In fact the Doctor said, your Honor, there was two sets of bruises, one made before the other one. Any they show the lighter and the darker show. But if you go blowing them all up, making them all dark, you can't differentiate between the light ones and the dark ones on these, on the pictures because they

all show darker there. And that, your Honor, those cases of Mr. Stevens are cases of murder. Take pictures at the site of the murder where the crime was committed. In this case it is an accusation that this man beat Myrtle Cathey on the 22nd of January. These pictures are taken on the 31st of January, ten days later, nine days later. If it was a case of a body at a scene of a crime, yes, I would say these can go in, but until they can show, your Honor, that these are true enlargements they should not go in. And the photographer himself said that they were not; that they accentuate the bruises.

Now, your Honor, I have tried quite a number of [459] murder cases. I think this is the thirty-first and I have seen many attempts on the part of District Attorney to get in enlargements. If the contact picture will serve the purpose, I have never yet seen an enlargement go in and Judge Pratt held the same way here about four years ago in a murder trial because they have two sets of pictures here, your Honor. One set for the jury, one set to show the true picture. The other set for, to show the prejudice.

The Court: At the time the Court ruled on the offer relating to the exhibits, the Court felt that they would be properly admitted and the Court still feels that their admission was proper and I at this time deny the motion to strike.

Mr. Taylor: If the Court please, one, on the one in the hospital can we, on that should a proper witness have that marked to show that the dis-

coloration around the mouth happened in the hospital.

The Court: I think that Mr. Urban has already testified to that.

Mr. Taylor: Already testified and the nurse testified that they was pumping out the phlem out of her throat.

The Court: Yes, I say that is before the jury. What additional do you wish on that?

Mr. Taylor: Well, I think it should be excluded. It is not a picture taken at any place near or the scene of the crime or immediately after the crime. It is a picture [460] taken ten days later. The whole works of them.

The Court: But Mr. Taylor, the Doctor as well as the photographer testified at length concerning the pictures. They identified them and said they were fair representations and I can't understand your statement that you didn't have an opportunity to cross-examine witnesses.

Mr. Taylor: No, your Honor, because they were not in evidence at the time that Doctor Anderson was on the stand.

The Court: Do you contend that the government had rested before the offer was made?

Mr. Taylor: Yes, sir, it is my recollection, your Honor, that they did.

The Court: It is not my recollection. I wonder, Mr. Stevens, do you have a recollection on that point?

Mr. Stevens: I definitely recollect, your Honor, that they were in evidence at the close of Mr. Dou-

thit's testimony and I offered them and that was when we had this small to-do up by the bench and there was definitely some words up there that I recall now and I am sure they were in evidence before they rested. The only point that came up was after we rested I wanted the Court, wanted Mr. Taylor to show that the evidence, those pictures, big pictures, had not been shown to the jury prior to the close of our case and that was because of the fact that there may be some sort of prejudice if they had been shown the pictures before the time the bruises were fully [461] described. In other words, so that, we are not trying to prejudice them by showing them these large pictures or anything or get the idea that they were being passed around in the jury box, which they were not.

The Court: That is the Court's recollection, that before the government rested Mr. Stevens asked the Clerk whether there were any exhibits that had not been offered but these exhibits had already been offered into evidence and received as exhibits before the government rested and before Mr. Stevens' statement and I see nothing wrong that has taken place.

Mr. Taylor: My recollection is, your Honor, the fact that after we had the argument on the motion for acquittal, made at the close of the government's case, was when Mr. Stevens then picked these things up and said they weren't in evidence, he wanted to offer them.

The Court: These exhibits that are in question now? I am sure that that is contrary to the Court's

recollection. Of course, the record will speak for itself on that. Are you ready to proceed? Shall we call the jury in?

Mr. Stevens: Yes, your Honor.

The Court: Is the defendant ready?

Mr. Taylor: Could I have about five minutes.

The Court: Yes, we will take a five minute recess.

Clerk of Court: Court is at recess for five [462] minutes.

(Thereupon, at 2:05 p.m., the Court took a recess until 2:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

Clerk of Court: Court has reconvened.

The Court: May the record show the presence of the defendant at all stages of this proceeding to date.

Mr. Taylor: We will stipulate that the jury is all present, your Honor.

The Court: The defense stipulates that the jury is all present. The government stipulates to the presence of the jury and the alternates?

Mr. Stevens: Yes, your Honor.

LEON D. URBAN

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

By Mr. Taylor:

Q. Mr. Urban, calling your attention to the testimony of a Mr. Meyers, who claims he was the ice-

(Testimony of Leon D. Urban.)

man, do you recall any altercation between you and Mrs. Cathey in the presence of him sometime after the first of January, this year?

A. No, I don't.

Q. And did you have, did you have any altercation with her prior to that time?

A. Yes. [463]

Q. Well, what, when was it and what took place?

A. Well, Christmas Eve about ten after twelve she was getting a little bit tight so started calling me names and I did slap her. I was pouring a drink and I just reached over, not too hard. She jumped back and fell down. She never, wasn't bruised up or anything, no marks showed so I went and took her in the back bedroom and talked to her. So she waited there and I went out and got a new watch I bought for her for Christmas so she came back out to the bar. We all had a drink. About all there was to it.

Q. Now, also in regard to the testimony of Mr. Meyers, stated that he heard groaning and moaning, pounding on the wall, could you explain that to the jury and the Court?

A. The only thing she would go, woo-woo or something like that and she would pound on the wall. There was no bell or anything there. When she wanted something to drink when there was people around because she would never go out when there was black mark on her face or anything, so I would take her back some orange juice or something. That was all she wanted. The door was never locked,

(Testimony of Leon D. Urban.)

when there was nobody in the room we always locked it because we keep money and papers back there. It just hangs underneath, got a hasp on it, just push it over on the hasp. The lock hangs on there all the time. I have a big hasp I put on there a lot of days around there, too, instead of locking it. [464]

Q. Do you recall the testimony of Mr. Meyers in regard to a hasp and a lock on that door to her bedroom? A. Yes, I do.

Q. And was that ever locked while Miss Cathey was in there? A. No.

Q. When was it ever locked?

A. Just when we left the place or were out around the bar when there is a bunch back around by the music box. Then most generally it is just hanging on there.

Q. Did you at any time ever hear any groaning and moaning by Miss Cathey during the nine days before she went to the hospital? A. No.

Q. Now, Mr. Urban, prior to the 22nd day of January, 1952, did you ever see any bruises on Miss Cathey's body or legs or arm?

A. Yes, she had two bruises on her shins from where she had slid off the edge of the bar into the shuffleboard.

Q. Now, wait just a moment. Let's take a look at these. I hand you phot No. 2 of Plaintiff's.

The Clerk: G, Mr. Taylor.

Mr. Taylor: No G on this one.

Clerk of Court: There is no place to put any of them. [465]

(Testimony of Leon D. Urban.)

Q. (By Mr. Taylor): Ask you to illustrate to the jury those marks that were on there that you refer to and how they were made?

A. Well, there is two marks on each shin where she was sitting up on the edge of the bar there is a bowling alley right along close. It is about twenty-four inches to walk through. Well, we was cleaning the bowling alley up and she was sitting on the edge of the bar there talking with her feet up on the stool and she jumped over, she was going to jump over my back. I was cleaning and she jumped over on that in the meantime I just stepped on the side, never knew what she was going to do. So that is what caused the bruises on her shins and along about the, oh, three or four days before the 22nd, about the 17th or the 18th, she had a big bruise on her hip, be on her left hip.

Q. I hand you photo No. 6 of that same exhibit, Mr. Urban, and ask you to hold that up, show it to the jury, and ask that they, maybe you had better come down here and walk along so they can see.

A. She was dancing in the room there and there was some song there and she was whirling around and she slipped and fell into the table and that was on her three or four days before and she, that when she bought that bottle of deratex, it is a big white bottle down in the Co-op, and rubbed on that. I rubbed it on myself the night before she went [466] out.

Q. What is the name of the medicine?

(Testimony of Leon D. Urban.)

A. Durito, d-u-r-i-t-o. I did write it down. I don't believe, it is in my other coat pocket. It costs a dollar forty-nine a bottle.

Q. What kind of medicine?

A. It is something like rubbing alcohol only it is a new kind of medicine.

Q. And I believe in relation to photo No. 1 that you have already testified that those marks were not on Miss Cathey's face when she went to the hospital, is that right?

A. Well, it don't show up like that because the scabs had peeled off and the stitches been taken out of the mouth. The marks were there. The marks on her lip was showing and there was a mark here where she had put that stuff on and the scab had come off so there was no blood on her mouth when she went to the hospital. She had, underneath lip was a soft, it hadn't healed up good yet where she had pulled the stitches out, but it was all right. It wasn't loose or anything on there.

Q. The stitches you helped take out?

A. Yes.

Q. Now, I hand you photo No. 4 and ask you to take a look at that and say when you, when you first noticed those bruises?

A. That is when she come home the day, the 22nd, that [467] is after she had fell off the bar stool and I had put her to bed and I didn't see those on her shoulders because I never pulled her sweater off. I saw them on her legs and on her breast there, she did show me that then.

(Testimony of Leon D. Urban.)

Q. And how about those many small blue marks on her, had you seen those before?

A. Well, there was a few on her legs and stuff around. She was always walking into something or falling into something anyway.

Q. Then on photo No. 3, will you state to the jury whether or not you had seen those pictures before, or those bruises on Miss Cathey?

A. Yes, well, some of them, older ones on her arms was on there before, but all the big bruises was on her when she come home the 22nd.

Q. Then——

A. Tell some of them, anybody could touch her and it would leave brown marks on her arms anyway.

Q. Then in photo No. 5, Mr. Urban, see anything peculiar about that picture as to any marks, bruises, swellings?

A. Well, her shoulders up there, there was no swelling on her, I rubbed her back there was no swelling on her back here at all, but on the neck, right across there was swelling and there was swelling on both sides of the ear. There was no swelling at all on her back. No marks there and up there they [468] were blue at last across the back of her neck. A bruise along about there.

Q. I believe you testified in the, in response to a question this morning that Miss Cathey did not want to go to the hospital?

A. That's right, sir.

Q. When she was first hurt. Then during, from

(Testimony of Leon D. Urban.)

the 22nd then until the, about ten-thirty on the night of the 30th then you took care of Miss Cathey then?

A. Yes.

Q. Mr. Urban, could you state approximately when it was that this carpenter that you refer to beat up Miss Cathey?

A. I couldn't tell you the exact date, but I was with a man by the name of Al Hopkins that night and we bought a baby swing and he was supposed to give me the blank check and I see him that would be the date of it. That is the only way I could find out the exact date.

Q. Can you say approximately when that was?

A. It was before Christmas.

Q. Just before Christmas?

A. I am sure it was just before Christmas.

Q. Mr. Urban, you ever been convicted of any crime?

A. No. I done ninety days in jail down in Eureka, California.

Q. What was that for? [469]

A. An argument over, well, I got a bus in Wildwood, California, and that is when it was in '37, I believe, I won't say just exactly what it was. It was in the summer.

Q. What year?

A. Well, maybe it was '38. I don't know just for sure what date it was now. It was the time that the Greyhound bus was striking and they had two different unions driving and I said, well, I got on, I said, I don't want to ride in this scabby bus and I got on.

(Testimony of Leon D. Urban.)

The bus driver stopped and was going to throw me off. When we got off the bus, driver swung at me and I swung at him.

Q. You got ninety days for fighting?

A. Well, I pleaded guilty to the fighting on the highway. They give me ninety days.

Q. You have any other convictions?

A. No. One time I put a girl out of the bar that worked for me. I fired her. She got drunk and I pleaded guilty then. It cost me twenty dollars.

Q. Any others?

A. No. I was out ticketed one time for a fight, never was convicted or anything for it.

Q. No conviction? A. No.

Mr. Taylor: May we have just a moment, your Honor.

The Court: Certainly. [470]

Q. (By Mr. Taylor): Mr. Urban, I believe you testified that the Doctor told you that everything was going to be all right with Miss Cathey?

A. That's right.

Q. The first trip?

A. That's right. He knows she would be all right in the morning anyway.

Q. What did he tell you?

A. He said she will be all right. If she is not better just call me in the morning. The next morning she was up so I didn't call the Doctor. She said, I don't need no Doctor.

Q. Did you call him later?

(Testimony of Leon D. Urban.)

A. Well, when I ordered the pills there.

Q. And then did you call him then between then and the 30th of January?

A. Yes, I called him on, I believe it was a Wednesday, I am not certain of the date, but it was about three days after the Doctor had been there.

Q. Did he come out?

A. No, he didn't. He come the first time. We didn't need him then when I ordered the pills.

Q. And then when was the next time you saw him after Wednesday?

A. On the 30th, that is when she——[471]

Q. What, if anything, did the Doctor say about Miss Cathey's condition at the time he was there on the 30th?

A. Well, he said, I said, well, how is she, Doc? He said, well, something about he might have to give her something. I don't know what he called it, some Doctor's word and I don't remember that so we had called the ambulance. I said, well, she belongs in the hospital, let's take her to the hospital, so that is when we called the ambulance and sent her to the hospital.

Q. Did he, did he state to you the seriousness of her condition before she went to the hospital?

A. No, he went home and went to bed. I guess he thought it wasn't too serious.

Q. Went home and went to bed?

A. I know they called him at home two or three times to get him up.

(Testimony of Leon D. Urban.)

Q. When did you first ascertain that her condition was really serious?

A. Well, that evening, Sunday evening, the 30th is when she wanted me to rub her back when she looked up and that is when I called the Doctor. She didn't look good then. She started breathing hard. She had been all right week before. She looking all right. She was getting around, eating and everything. In the afternoon, Sunday afternoon we fed her. Well, she got up Saturday there at the table and I remember we was [472] talking, talking about the sale and I said, hell, if you are able to work we could have the sale. She said, I'm not bruised up too bad, maybe I will be able to work. I said, well, it won't make any difference, just keep it locked up anyway. Got to have sale, had a lot of stuff to sell that night, Monday night.

Q. Did she show any fear of you, Mr. Urban?

A. No, she wasn't afraid of nothing, nobody. Also even at night she would go for walks. She walked all over town. She would walk to town different times she's come to town just like if we needed lemons for the bar, she would walk clear to the J & A Food Store, all over town. She liked to walk. She had some red boots and a red parka. She would walk all over. Cold never bothered her.

Mr. Taylor: You may take the witness.

(Testimony of Leon D. Urban.)

Cross-Examination

By Mr. Stevens:

Q. Mr. Urban, I thought you told us here this morning that the only time you had ever touched Mrs. Cathey was when you were just playing around and she was playing, too?

A. He didn't ask me.

Q. This morning didn't Mr. Taylor ask you if you had ever hit her?

A. He was asking me about the time when the iceman was there. [473]

Q. He never asked you if you had hit her before?

A. I don't remember.

Q. Do you remember being asked whether you had ever even slapped her?

A. At the time the iceman was there.

Q. This morning?

A. Well, I thought he was asking about the iceman.

Q. Did you see Mrs. Harris outside here this morning and this noon? A. I saw her, yes.

Q. She was present on the time, on the time on Christmas Eve, was she not? A. Yes.

Q. Is that what refreshed your memory about that occasion? A. No.

Q. Did you know Mrs. Harris was coming here today? A. No, I didn't.

Q. Did you talk to anyone to see that she couldn't come? A. No.

Q. Did you ever tell anyone, Mr. Urban, that

(Testimony of Leon D. Urban.)

Miss Cathey was out with a trick on the night of the 21st and that is why you beat her up?

Mr. Taylor: We object to that, your Honor. Calls for a hearsay, calls for hearsay [474] testimony.

The Court: He may answer.

Mr. Urban: I don't know for sure if I did or not. Never talked that way.

Q. (By Mr. Stevens): You stated here this morning that Miss Cathey never told you whether it was a man or a woman that beat her up, is that right? A. That's right.

Q. But before that you had already told us that she said that a woman had beat her up?

A. That is what she asked me to tell when she come back to the place.

Q. When did she ask you to tell that?

A. Well, when she come back about two-thirty, that is when I told her we are going to have to call a doctor. I said what are you going to tell this doctor when he comes.

Q. That was the first night?

A. That's right.

Q. Which night was that, Friday night or Saturday night?

A. That would be Saturday, the 22nd.

Q. You were a witness at the coroner's inquest, were you not, Mr. Urban? A. Yes, sir.

Q. Do you remember the date you told the coroner's inquest that Miss Cathey went out? [475]

Mr. Taylor: Just a moment, your Honor, we are

(Testimony of Leon D. Urban.)

going to object to that upon the grounds that he has not been shown the minutes of the coroner's inquest.

Mr. Stevens: I think I can question him about his memory.

The Court: He was merely asking a preliminary question. He may answer.

Mr. Urban: She left around the 21st, yes.

Q. (By Mr. Stevens): I asked you, Mr. Urban, if you remember what you told the coroner's inquest that she went out on the date, you remember that date?

Mr. Taylor: Just a moment, your Honor. We are going to object to the question as calling for something that is not in evidence in this case, improper cross examination because it wasn't gone into, your Honor, upon direct examination.

The Court: Overruled.

Mr. Urban: I don't remember the instance.

Q. (By Mr. Stevens): But you do remember testifying down there? A. Yes.

Q. Did you mention during your testimony at the coroner's inquest whether or not Miss Cathey had ever told you who beat her up?

A. Well, she never did tell me. [476]

Q. Did you tell them that a trick had beaten her up?

A. I told them I didn't know, that I presumed from the way she talked to me.

Q. Now, Mr. Urban, did you see Officer DeWalt of the City Police the night that the ambulance came after Mrs. Cathey? A. Yes.

(Testimony of Leon D. Urban.)

Q. And did you talk to him then?

A. No, they was putting her in the ambulance. He asked me what happened and I told him we had the doctor.

Q. You didn't tell him anything concerning anything, what had happened to her?

A. I just told him she had had a fight with some woman. That's all I told him.

Q. Two or three days before?

A. No, sir, I never told him no date at all.

Q. So Mr. DeWalt is not telling exactly the things that happened?

A. I am not saying he is telling anything. I just didn't tell him what date.

Q. Did you, you remember seeing the nurses in the hospital that testified here? A. Yes.

Q. And did you tell them what they said, that the bruises behind the ears came from hitting a bar stool? A. I never said that. [477]

Q. And did you talk to Mr. Goodfellow before the death of Mrs. Cathey in the hospital?

A. Just a few minutes before she died.

Q. Did you tell him that this was just a hair-pulling contest between a couple of women?

A. I told him she told me she had a fight with some woman. I thought she would be all right. He said, do you think she would sign a statement against anybody. I told her no.

Q. But you didn't mention a hair-pulling contest at all?

A. I might have called it that. I won't say.

(Testimony of Leon D. Urban.)

Q. You don't know whether you did or not?

A. I know I told him these women had a fight from what she told me, I didn't——

Q. Did you mention a woman named Peggy?

A. No.

Q. You didn't mention anyone by specific name?

A. No.

Q. Did you give them a description?

A. He asked me if I know anybody she had had arguments with.

Q. What did you tell them then?

A. Well, I told him I wasn't sure.

Q. But you didn't give him a description of a woman purportedly named Peggy? [478]

A. No, because I wasn't acquainted with anybody by that name.

Q. Did you tell him you would know the woman that beat up Miss Cathey when you saw her?

A. I never said the woman that beat up Miss Cathey. I said a woman she had had a fight with one time.

Q. My question is, did you tell him that night that you would know the woman who did beat up Mrs. Cathey when you saw her? A. No.

Q. And did you go over to the city police station later on? A. Yes.

Q. Saw Mr. Goodfellow and Mr. Wirth over there then? A. Yes, sir.

Q. Is it true that they looked at your hands over there? A. Yes.

Q. Did you have a big ring on your finger then?

(Testimony of Leon D. Urban.)

A. I always wore a ring.

Q. Where is it now? A. It is in hock.

Q. Whose got it?

A. It is put away down town. I borrowed money on it.

Q. What place is that?

A. Well, I can produce it. I don't wish to say in Court but I can give you the note and you can [479] get it.

Q. Did you ever talk to anyone concerning that ring as concerns the bruises on Mrs. Cathey?

A. No, sir.

Q. You didn't inquire as to whether or not a person that you know would know whether or not that ring would make an impression on a woman when you used it? A. No, sir.

Q. Now, where were you living just before the 21st of February? A. Alibi Club.

Q. In the Alibi Club or the little room behind?

A. Well, I stayed both places. Whenever I felt like sleeping.

Q. Wasn't it a fact that Tom, your bartender, lived in that place behind the surplus store?

A. Not in the winter time.

Q. Did you ever stay back there in the winter time?

A. Once in awhile last winter I slept back there a few times.

Q. Where did you keep your clothes?

A. In the Alibi Club.

Q. And where did Miss Cathey keep her clothes?

(Testimony of Leon D. Urban.)

A. In the Alibi Club.

Q. In that bedroom, were they not?

A. Yes, sir. [480]

Q. Did you see Mr. Haretos here the other day?

A. Yes, sir.

Q. Have you ever seen him before?

A. I wouldn't know him.

Q. Did you see him that night at the Players Club?

A. I never paid any attention to him there.

Q. Did you see him follow you out to the cab?

A. Nobody followed me out to the cab.

Q. Did you beat Mrs. Cathey as you drove away in that cab? A. No.

Q. Did you hear Mr. Haretos say he saw someone beating the woman in the back seat?

A. I heard him say that.

Q. That was not true?

A. I was holding on to her arm, trying to keep her from getting out of the cab. She wanted to go some place else.

Q. Miss Cathey didn't stumble and fall in the Club? A. No.

Q. She got in the cab all right by herself?

A. I opened the door and she was getting in.

Q. Did the cab driver that was driving the cab you got in help pull her across the seat?

A. I don't know if he did or not. I pushed her over and got in. [481]

Q. What did she do then?

(Testimony of Leon D. Urban.)

A. She wanted out. She said, I want out.

Q. Did she try to get out the other side?

A. Yes.

Q. What did you do?

A. Got ahold the other arm.

Q. Did you hit her at all? A. No.

Q. How did she get the bloody nose?

A. She either bumped me or bumped into the door, I don't know.

Q. Did you see what happened?

A. Well, I don't know how she bumped her nose or how might have, I don't know about that.

Q. Was she conscious when you got to the Alibi Club? A. Yes.

Q. What kind of cab did you drive down to the Alibi Club in? A. I rode down in a pick-up.

Q. No, I mean, to the Alibi Club from the Players Club on the night of the, either the 21st or the 22nd, whichever it is? A. Radio Cab.

Q. It was a cab the same type that Mr. Jennings drives? A. I guess so. [482]

Q. And when you got there you did go up and open up the door? A. Yes.

Q. Then you came back to get Mrs. Cathey?

A. Yeah, she was still sitting in the cab.

Q. She had wanted to get out of the cab all the time up before that?

A. Well, she was home, she knew she was going to go home.

Q. So she was home, she was going to go in, is that right?

(Testimony of Leon D. Urban.)

A. I come back and got her by the arm and she went on in.

Q. She didn't try to get out the other side any more?

A. No, she didn't say anything at all.

Q. Did you have any further type of a fight with Miss Cathey before Christmas, other than just hitting her?

Mr. Taylor: Just a moment, your Honor. We are going to object to the form of the question. No evidence that there was any fight with her.

The Court: Maybe fight is the wrong word. I will sustain the objection.

Q. (By Mr. Stevens): You stated that you hit Mrs. Cathey on Christmas Eve, is that right?

A. Never hit her. [483]

Q. What did you do? A. Slapped her.

Q. Which side of your hand, the forehand?

A. Front of my hand. I was standing on the bar, never hit her very hard. No bruises next day for Christmas dinner.

Q. There were no marks on her at all?

A. No, we went to a party for dinner.

Q. Did you, had you hit her before that night?

A. We had had different little family arguments like other people, have, nothing that amounted to anything.

Mr. Taylor: Will you keep your voice up, Mr. Urban?

Q. (By Mr. Stevens): I asked you specifically, had you hit her before that night?

(Testimony of Leon D. Urban.)

A. I never did hit her.

Q. Did you ever hit her so the mark of your ring would leave a mark on her body?

A. No, sir.

Q. During the time after you went back into the club on the morning of the 22nd of January, did you hit Mrs. Cathey in the club? A. No.

Q. Did you tell anyone since then that you had to cuff her around a little bit to straighten her up?

A. No, I used to scold her once in awhile after we had [484] closed up for drinking and not taking care of business good enough.

Q. Specifically have you told——

Mr. Taylor: Just a moment, would you repeat that, please. What was that answer? Will you read the answer, please?

(Thereupon, the reporter read the last answer.)

Q. (By Mr. Stevens): My question is, did you tell anyone that after you went into the club you had to cuff her around because she was so drunk you had to straighten her up? A. No.

Q. You heard the testimony of Mrs. McGraw on the stand, did you not? A. Yes.

Q. Was she present in the Alibi Club on Friday night of the, let's see, it would be the 29th, I believe, 28th?

A. Yes, they was in for a few minutes.

Q. It would be the 28th of January?

A. They come in and paid me some money they

(Testimony of Leon D. Urban.)

owed me for a bail I went New Year's Day when they were arrested for drunk driving.

Q. Did you hear her testify concerning the groaning from the room?

A. Yes. I don't know why she call it [485] groaning.

Q. There was no groaning going on?

A. Only thing she done she was calling for a glass of juice. She would pound on the wall like that. That is the easiest way to get ahold of me. The bar was right along side the wall.

Q. Were they there on Saturday night?

A. I don't remember if they stopped in Saturday in night or not.

Q. Did you hear any groaning on Saturday night?

A. Nothing unusual outside of wanting something.

Mr. Taylor: Just a moment. I think he should specify which Saturday night, your Honor. A lot of Saturdays in the year.

The Court: If the witness doesn't know, but the witness answered the question.

Q. (By Mr. Stevens): Is there any doubt in your mind which Saturday night I am referring to, Mr. Urban?

Mr. Taylor: Don't answer it, Mr. Urban. We are going to object to the question, improper. Fix a time as to what he is inquiring about.

The Court: But Mr. Taylor, the witness must have known the Saturday night or he wouldn't have

(Testimony of Leon D. Urban.)

answered the question. If he doesn't know—you may proceed.

Q. (By Mr. Stevens): Do you know a Mrs. Frank Legerat? [486]

A. Not by that name. I might know her, too. I don't know her by that name.

Q. A woman that lives down near Tinker's Cafe, who is pregnant at the present time?

A. Yeah. What is her first name?

Q. Do you know her first name?

Mr. Taylor: Just a moment. I am going to object to the question for the reason that it is no question, your Honor. If pregnancy is the criterion as to the name, I think it should be pinpointed down.

The Court: I think the examiner asked if he knew a certain woman and gave the husband's name and now he is asking if he knows her first name. The witness may answer if he knows.

Mr. Urban: Eileen. I didn't know her last name, but I know who you mean.

Q. (By Mr. Stevens): Was she a friend of Pat's?

A. Well, I don't believe no more than hers or mine. She always come around the place once in awhile.

Q. She did spend some time around the Alibi Club in December and January, did she not?

A. Well, they used to come in before they went up north to go to work. Frank and Eileen is all I ever did know, the name.

Q. Were you present during the latter part of

(Testimony of Leon D. Urban.)

December at [487] the Alibi Club when Mrs. Le-
gerat and Mrs. Cathey had a conversation concern-
ing Mrs. Cathey's hair?

Mr. Taylor: Just a moment, your Honor, we are
going to object to any questions about conversations
until the time is fixed or a specific day.

The Court: Well, within reason the examiner
should be specific, but let's hear the question and
the witness can determine whether he can answer it
or not.

(Thereupon, the reporter read the question.)

Mr. Urban: What was that about hair?

The Court: Will you specify the year, Mr. Stev-
ens?

Mr. Stevens: 1954, I'm sorry.

Mr. Taylor: Just a moment, we are going to ob-
ject on the ground that any conversation about Mrs.
Cathey would be inadmissible. It is so remote it
would have no bearing on the case.

The Court: He was asked if he was present. He
may answer.

Mr. Urban: I don't know.

Q. (By Mr. Stevens): Do you recall that Mrs.
Cathey had lost a large ball of her hair, a large
portion of her hair the month of December, 1954?

A. Well, I knew her in August and she had been
combing that hair out of her head and putting it in
a ball. She had a [488] ball of it. Everytime she
combed her hair she would put the hair all in it.

Q. But did you know of any particular portion
of her head where the hair was pulled out?

(Testimony of Leon D. Urban.)

A. None that I know of.

Q. You never saw that?

A. She might have had her hair pulled for all I know. I never paid any attention to it.

Q. Did you pull it out? A. No, sir.

Q. You saw this red parka, that is here in evidence, did you?

A. I gave a check for it. I bought it.

Q. Is that Pat Cathey's parka, was it?

A. Looks like it.

Q. Did you send it to the cleaners?

A. Yes, sir.

Q. Was there blood on it when you sent it to the cleaners?

A. Some on the front, if I know it was blood.

Q. Was she wearing it the night that you saw her get a nosebleed? A. Yes.

Q. Do you doubt that there was blood on the front of her coat?

A. There was blood on it. [489]

Mr. Taylor: Just a moment; just a moment. We are going to object. He has already testified there was blood on the front of the coat. Just repetitious.

The Court: He may answer.

Mr. Taylor: Just taking up valuable time of the Court and attorneys.

Mr. Stevens: I'm sorry, your Honor. The direct examination took some three hours. I have been just twenty minutes now.

The Court: The length of time hasn't anything

(Testimony of Leon D. Urban.)

to do with it. We don't know just how long it is going to go. You may continue.

Q. (By Mr. Stevens): What did you first do when you went into the Players Club?

A. I bought a drink.

Q. On the night or the morning of the 22nd?

A. I bought a drink.

Q. How many people were in there?

A. Not very many. The drinks, it only cost eight dollars a round so you can figure that out.

Q. Did you buy one round or two rounds?

A. I bought two rounds.

Q. And when you got there was Miss Cathey sober? A. Well, she had been drinking.

Q. Pardon? [490]

A. She had been drinking.

Q. Well, you knew her quite well, didn't you?

A. Yes.

Q. You had been around her when she was drunk before, hadn't you? A. Yes.

Q. Well, was she drunk that night?

A. About half.

Q. Was she half-drunk when you went in or when you came out?

A. Well, she took two more drinks. I can't say just how drunk she was right at the time.

Q. Did she stagger at all when she came out?

A. Well, we had ahold of her arm or she had ahold of mine when she left.

Q. Did she need help?

A. There was no argument there.

(Testimony of Leon D. Urban.)

Q. Pardon me?

A. There was no argument when we left. We just left together. She was holding on to me or I was holding on to her.

Q. Was she so intoxicated she needed help?

A. I don't think so.

Q. You said she had been working until about midnight of that evening?

A. Yes. [491]

Q. And you left the Players Club sometime around four, did you?

A. I can't say the exact time, but after, around four.

Q. Did she try to go back into the Players Club?

A. No.

Q. As you were driving toward the Alibi Club that night, did the taxi driver make a stop at Cushman Street?

A. I can't say.

Q. And when you got down to the Alibi Club you went in there again, you went back into the club, did you, the two of you, after the cab drove you down there?

A. Yes.

Q. How did she get in?

A. What?

Q. How did she get into the club?

A. I took her in. We went in together.

Q. Did she walk?

A. Sure she walked.

Q. She need any help?

A. I had my arm around her.

Q. You said that it was your opinion that she wanted to go home at that time, is that right?

A. Yeah, after we got home she was all right.

(Testimony of Leon D. Urban.)

Q. But she didn't get out of the cab and walk up to the Club with you? [492]

A. Well, I opened the door. It was cold, pretty cold that morning.

Q. How cold was it that morning?

A. I don't know but it was cold.

Q. Was it real cold?

A. I imagine it was twenty or beter.

Q. Would it surprise you if it was only one degree below?

A. I don't know, but the door was froze shut.

Q. You are sure of that?

A. It was always froze up. The heat from the inside of the building against the door and freeze it.

Q. Oh, but the only reason she didn't come out of the cab she was just waiting for you to open the door, is that it?

A. I guess so. She might have been thinking it over.

Q. She didn't need any help getting out of the cab?

A. I got her by the arm.

Q. Did she need any help getting out of the cab?

A. I don't think she would have if she had to get out.

Q. Did you ask her to get out?

A. I said, Pat, come on, let's go home.

Q. Then what did you do?

A. Walked inside and had a drink.

Q. I mean outside, did you get her by the arm?

A. No. [493]

Q. Did you pull her out of the cab?

(Testimony of Leon D. Urban.)

A. Just reached in and pulled her out.

Q. When you got inside what did you do?

A. Well, we, I went in behind the bar. We had a drink, maybe two or three.

Q. How many did you have?

A. I don't know, a couple or maybe three. Just set the bottle there, we sat there and talked awhile.

Q. How long did you sit there?

A. Oh, I wouldn't say, don't know. Maybe an hour. Maybe an hour and a half. Maybe thirty minutes.

Q. How many drinks do you know that she had?

A. Oh, we had two or three. Bottle was setting there. I never kept track of it.

Q. And then what happened? A. When?

Q. After you had the drinks?

Mr. Taylor: Where?

Q. (By Mr. Stevens): Where we have just been? We are in the Alibi Club on the morning of January 22nd, 1955. It is about, between five and seven. Is that close enough, Mr. Urban?

A. Yes.

Q. What happened after that?

A. Said she was going to leave, said she wanted to go back up town. [494]

Q. Did she get up by herself? A. Yes.

Q. She go back up to the door by herself?

A. Yes.

Q. How sober was she then?

A. She could still walk.

(Testimony of Leon D. Urban.)

Q. This morning you said she had four or five more drinks, how many more was it?

A. Well, she had the bottle setting there. I can't say how many she took.

Q. When was the next time you saw her?

A. Around two o'clock in the afternoon.

Q. Do you know it was two o'clock in the afternoon?

A. Well, I talked to her there when I looked at the clock because I always got up around two-thirty, three o'clock anyway.

Q. This morning you said you didn't look at the clock, Mr. Urban?

A. Well, when I called the cab there I looked to see what time it was. I know that.

Q. Well, were you calling a cab at two o'clock?

A. No, not then, but I mean I know it was around two o'clock when I, when she got home because I looked. We got the clock on the wall there, Burgemeister clock.

Q. Now, you remember talking to Mr. Wirth and Mr. Mayfield and Mr. Goodfellow down at the Territorial Police [495] station do you? A. Yes.

Q. That was following a conversation you had with Mr. Wirth and Mr. Goodfellow at the Alibi Club, is that right?

Mr. Taylor: Just a moment. I think we had better establish the date, your Honor.

The Court: Well, there has been a lot of testimony about those particular ones. I, perhaps this

(Testimony of Leon D. Urban.)

is a different time. Counsel, will you establish the date?

Q. (By Mr. Stevens): I believe he testified himself. What date was it, Mr. Urban, that you had that conversation? A. With who?

Q. With those gentlemen you have just named, Mr. Wirth and Mr. Goodfellow first and then Mr. Mayfield and Mr. Wirth and Mr. Goodfellow?

A. Around the 4th of February.

Q. You remember having the conversations, do you? A. Yes.

Q. What date did you tell Mr. Mayfield that the, that Pat Cathey called you down to the Players Club?

A. What time she called me?

Q. What date?

A. Well, that would be the 22nd, early in the morning.

Q. You didn't tell him it was Friday morning, the 21st? [496]

A. Couldn't have been.

Q. I didn't say whether it could have been. I asked you if you did? A. No, I didn't.

Q. You stated that you called Mr. Beasley in the afternoon of the 22nd? A. Yes, sir.

Q. What happened when Mr. Beasley came?

A. I just called a cab, I wanted to take her to the hospital.

Q. Well, what happened when he came?

A. I went and opened the door. He come in so I said, well, let's take Pat to the hospital. I walked

(Testimony of Leon D. Urban.)

over, she was sitting along side of the bed. She said she wasn't going to go to the hospital.

Q. Where was Mr. Beasley then?

Mr. Taylor: Could we have the recess now, Your Honor?

The Court: Yes, I don't like to interrupt counsel, but it is a little past three o'clock so members of the jury, once more I admonish you not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion until the case is finally submitted to you. We will take a fifteen minutes recess. [497]

Mr. Taylor: If the Court please, before you adjourn, I have a witness here I would like to call out of turn. We had him come in from his work on the base, tied up a truck. We would like to call him upon the reconvening, after the recess.

The Court: Government see any objection to that. How long will it take with that witness, Mr. Taylor?

Mr. Taylor: Oh, I think about ten or fifteen minutes. Not more than that.

Mr. Stevens: We have no objection.

The Court: Very well.

The Clerk: Court is at recess until 3:30.

(Thereupon, at 3:05 p.m., the Court took a recess until 3:20 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record again show the presence of the defendant and his attorney, Mr. Miller. Mr. Stevens?

Mr. Stevens: Your Honor, I would like to change my comment at the last of the session and object to the admission of this other witness until I pursue this line of cross-examination. I find that the witness that is to be called at this moment was the precise witness I was just asking Mr. Urban about and as soon as that questioning is finished, I will have no objection. [498]

The Court: Very well, we will take it up when Mr. Taylor comes in the room. Assuming that he will be here shortly. If the witness will just wait a moment, please. Mr. Taylor, the government has just voiced an objection to the calling of this witness at this particular moment and we will discuss that in your presence now that you are here. I will let——

Mr. Taylor: Yes, Your Honor, this man has been waiting all afternoon. He has been driving a truck for M. K. Company, holds the truck up. They let him come down here and I wanted to recess so we can take his testimony and get him back on the job.

The Court: The Court understands very often the urgency of witnesses, but the Court also understands it is not always well to interrupt the cross-examination of an important witness.

Mr. Taylor: I don't understand, Your Honor, the District Attorney agreeing to it and I bring the man here.

The Court: As I say, I think Mr. Stevens has a statement to make in your presence.

Mr. Stevens: I was just cross-examining Mr. Urban concerning Mr. Beasley and statements made before concerning Mr. Beasley. Mr. Taylor now wants to bring him in. He has been out there all afternoon. To impose him now, I believe is wrong. I'm sorry, but I have to change my mind. [499]

The Court: You have asked as I understand it, to continue the cross-examination of the defendant?

Mr. Stevens: Just concerning this witness.

Mr. Taylor: I have no objection to that. Would you wait outside, Mr. Beasley, for a few minutes?

The Court: Yes, and we will proceed.

LEON D. URBAN

the witness on the stand at the time the recess was taken resumed the stand for further cross-examination.

By Mr. Stevens:

Q. I just asked you whether Mr. Beasley came into the club? A. Yes.

Q. How far into the club did he come?

A. Came back to the bed.

Q. Did he go into where Mrs. Cathey was?

A. Well, he come to the door. The bedstead sets close to the door.

Q. And what did you do then?

A. I got her by the arm. I said come on, Pat, you have got to go to the hospital.

Q. Did Mr. Beasley assist you?

(Testimony of Leon D. Urban.)

A. He was right there.

Q. Did he assist you?

A. Well, I don't know if he got her by the arm or not. [500] I think she said, I'm not going to see no doctor. I'm not going to no hospital. I will take care of all my own beefs.

Q. About what time was that?

A. Oh, after four o'clock, around four o'clock.

Q. Did he help you get her on her feet?

A. I, I'm not certain. I know I had her by the arm, if he did or not.

Q. Do you remember discussing this matter before the coroner's jury?

A. Well, I remember I told it.

Q. Did you tell them that he helped you get her on her feet?

A. I am not sure that he helped me.

Q. Do you know now whether he did?

A. I am not sure.

Q. You just talked to him out in the hall, didn't you?

A. I never asked him nothing about that.

Mr. Taylor: Just a moment, Your Honor, I am going to object to improper cross-examination, these slurs that he throws, talked to Mr. Beasley out in the hall.

Mr. Urban: I could have talked to Mr. Beasley every day for three months.

The Court: Counsel can ask him if he talked to him about this case.

(Testimony of Leon D. Urban.)

Mr. Urban: Nothing was said about the case out there. [501]

Q. (By Mr. Stevens): Did she fight with you when you tried to get her to go to the hospital then?

A. No, she just said she wasn't going to go.

Q. She didn't fight?

A. She just said she wasn't going. No fight, no argument, no nothing. She just said flat she wasn't going.

Q. Did she fight with Mr. Beasley?

A. No, she just said she wasn't going.

Mr. Taylor: Just a moment, Your Honor. I am going to object to this examination. There is no testimony in the regard at all that she was fighting about going to the hospital. Mr. Stevens is attempting to get in the minds of the jury that there was a fight about going to the hospital or not going.

The Court: I don't know that that is what he is attempting, but he may proceed and ask questions.

Mr. Taylor: I don't either.

The Court: The Court will listen to objections interposed and rule on them.

Q. (By Mr. Stevens): Did you tell the coroner's inquest that she fought you and Mr. Beasley and would not go to the hospital when he came?

A. She didn't fight. She said flatly she wasn't going to go. [502]

Q. Do you recall now whether you told the coroner's jury that? A. I never said she fought.

Mr. Taylor: Just a moment. Don't answer that. Your Honor, I believe the minutes of the coroner's

(Testimony of Leon D. Urban.)

jury would be the best evidence, should show them to Mr. Urban and ask him if he made such a statement.

The Court: I believe that would be a proper way to interrogate the witness concerning previous testimony.

Mr. Stevens: Well, Your Honor, I would be very pleased to bring it in. It is on a tape. If Your Honor would like to allow us to play the tape?

The Court: You mean there is no record?

Mr. Stevens: There is a record for my purpose but the official record at the coroner's inquest was taken on a tape.

The Court: You may proceed, Mr. Stevens.

Q. (By Mr. Stevens): How long have you known Mr. Beasley?

A. I just knew him since he was driving cab.

Q. Did he know Pat Cathey?

A. He met her out at the place when she tended bar, I believe.

Q. Do you know if she knew him well?

A. Just over the bar is all, or in a cab when I was [503] riding with her.

The Clerk: Government's Identification No. 20.

(Transcript of testimony at inquest of deceased was marked Government's Identification No. 20.)

Mr. Stevens: Your Honor, this is a, the transcript that I have had made from the tape. This is

(Testimony of Leon D. Urban.)

Government's Identification 20, Mr. Urban's testimony at the coroner's inquest.

Q. (By Mr. Stevens): Mr. Urban, this is Government's Identification 20, would you read that?

Mr. Taylor: Just a moment, Your Honor. We are going to object until the proper foundation is laid. Don't answer the question, Mr. Urban. No showing that this is the official record, not signed by anybody. We don't know whether it is the testimony of the witness or not. I think it would be improper, too.

The Court: You have Mr. Stevens' statement is all for the introduction. I don't know.

Mr. Stevens: Well, this is from Mr. Taylor's own request. He says the minutes would be the best evidence. I am just supplying his request.

Mr. Taylor: The official record. This don't show to be the official record.

Mr. Stevens: There is no official record of the [504] coroner's inquest. If there is no official record, I can lay——

The Court: You can ask him if he asked a certain question if he made a certain answer.

Mr. Stevens: That is correct. Thank you, Mr. Urban.

Mr. Taylor: There is no official record.

Mr. Stevens: Then if there is no official record I can ask him the question.

Q. (By Mr. Stevens): Now, Mr. Urban, at the coroner's inquest did you testify concerning Mr. Beasley? A. I said he was there.

(Testimony of Leon D. Urban.)

Q. Did you state that we tried to get her to go to the hospital?

A. Well, I called him and I told him to go ahead and call the doctor. He talked to her. I don't know just how, what was said, exact words right now.

Q. At the coroner's inquest were you not specifically asked who we meant when you said, we tried to get her to go to the hospital?

A. That is the only one I talked to was the cab driver.

Q. Were you asked that? A. Yes.

Q. And do you recall at this time what you said in answer to that? [505]

A. Well, I know that we asked her to go. I said, well, maybe you can talk her into the notion of going. Beasley.

Q. Did you state that, I wanted her to go to the hospital, have her lips sewed up, and she wouldn't go, and she fought with us something terrible?

A. She didn't fight. She swore and said she wasn't going to go. Call it fighting, whatever you want to.

Q. You didn't state that, that she fought with the two of you?

A. Well, hitting, there was no hitting or anything, just word of mouth that she wouldn't go.

Q. How did you know, Mr. Beasley was there when he came to the club?

A. Well, the car honked and I went and looked out the door.

Q. Did you tell him anything at that time?

(Testimony of Leon D. Urban.)

A. No.

Q. Did he come in? A. Yeah.

Q. Did you tell him what you wanted to do?

A. I just told him, I said, let's get Pat, load her in the cab.

Mr. Taylor: Just a moment, Mr. Urban, don't answer any more questions, please, until we have a chance to make an objection. Your Honor, I think that the proper method, [506] Mr. Stevens knows it, too, is to ask him if he made such and such an answer to such and such a question. And we are going to advise him not to answer until they are propounded in that manner.

Mr. Stevens: That is what about five minutes ago, Your Honor, when we were on that point.

Mr. Taylor: We are still on it.

The Court: Sustained. You may proceed in that manner, Mr. Stevens.

Mr. Stevens: But I am not questioning him about any specific statement he made at this time. I just asked him what he told the driver at that time, Your Honor.

The Court: Let's have the question read, please, Mr. Templeton.

(Thereupon, the reporter read the last question and answer.)

The Court: And that is when Mr. Taylor interposed the objection? Objection overruled.

Q. (By Mr. Stevens): Would you tell us now, did Mr. Beasley touch Pat Cathey that evening?

(Testimony of Leon D. Urban.)

Mr. Taylor: Just a moment, Your Honor, I am going to object unless he states whether or not that question is taken from the transcript or if he is reading the transcript of the coroner's jury and then asking him the question. [507]

The Court: He may ask the question and the witness may answer it.

Mr. Urban: I don't know for sure.

Q. (By Mr. Stevens): Was he inside the bedroom? A. He was to the door.

Q. Was he up to the bed?

A. He was up to the door.

Q. Did he ever get inside the door?

A. Well, the bed is about twenty-four inches of the door anyway.

Q. Just two feet back from the door?

A. Just about two feet, two and a half feet.

Q. Did he go in the bedroom at all?

A. I don't believe so.

Q. Was Pat on her feet while he was there?

A. Yes, she was up on her feet. She was sitting on the side of the bed when he came.

Q. Did you help her get up?

A. I had her by the arm. That is when she said she wouldn't go.

Q. Did he try to help her get up?

A. I don't know if he had ahold of her. I don't believe he did. I won't say for sure.

Mr. Stevens: We will withdraw our objection to Mr. [508] Beasley at this time, Your Honor.

(Testimony of Leon D. Urban.)

The Court: Now, Mr. Taylor, do you want Mr. Urban to step down?

Mr. Taylor: Yes.

The Court: You step down, please, and will you call Mr. Beasley. It is understood that Mr. Urban will resume the stand.

Mr. Taylor: Yes, sir.

THEODORE BEASLEY

a witness called in behalf of the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Taylor:

Q. You state your name, please?

A. Ted Beasley, Theodore Beasley.

Q. Where do you reside, Mr. Beasley?

A. 646 Fourth.

Q. And what is your occupation?

A. Shovel and dragline operator.

Q. And who are you working for at the present time?

A. Driving truck for P. K. out here now.

Q. Are you acquainted with Leon Urban, the defendant in the case on trial now?

A. Yes, sir.

Q. How long have you known him? [509]

A. About a year.

Q. And where has that acquaintance been?

A. Hauling him back and forth when I drove cab here this winter for the Veterans Cab.

(Testimony of Theodore Beasley.)

Q. Did you know Pat Cathey in her lifetime?

A. Yes, sir.

Q. Now, calling your attention to the 22nd day of January, 1955, did you have any occasion to go to the Club operated by Mr. Urban and Miss Cathey?

A. I received a call, I believe it was 4:06.

Q. Four zero six in the afternoon?

A. Yes, sir.

Q. And who was that call from?

A. To go to the Alibi Club.

Q. And what did you do in response to that?

A. Left the cabstand over here and drove out to the Alibi Club.

Q. And when you got there, what did you do, Mr. Beasley?

A. Blow my horn, got out and went inside.

Q. And who was there?

A. Mr. Urban and Pat.

Q. Where was Miss, Pat, you mean Mrs. Cathey?

A. Yes, sir.

Q. And where was she?

A. Sitting on the side of the bed. [510]

Q. And where was Mr. Urban?

A. Standing right at the corner of his bar out this side of the place as you go in.

Q. And what did you and Mr. Urban then do?

A. Well, Curly told me he says, I have called you out here, he said, I want to take Pat to the hospital. She refused to go.

Q. And what did you do then?

(Testimony of Theodore Beasley.)

A. I suggested to call Doctor Weston and I was told to leave the phone alone, that she said she would take care of her own beefs.

Q. And did you have an opportunity to observe her at that time, Mr. Beasley?

A. Well, I saw her sitting in there but it is a little dim. The light is rather dim as you go in one of those places and she was sitting on the bed.

Q. And did you go into the bedroom?

A. No, sir.

Q. How far is the edge of the bed from the door?

A. Twelve to fifteen feet, I would guess, not over twelve, I think.

Q. I mean from the door of the bedroom?

A. Well, you see as you go in the place here is the door of the club. Here is an opening, little anti-room like where there is piano and nickelodeon set and right there is the [511] opening to her door where she was sleeping or where the bed was.

Q. How far was it from the opening of that door where she was sleeping to the bed?

A. From the door that opened into her bedroom?

Q. Yeah.

A. I would say about two feet. Not over three hardly.

Q. And where was Mr. Urban then?

A. Mr. Urban was at the corner of his bar.

Q. And what, if anything, did you do in regard to getting her to go to the hospital?

A. He asked her to go and I asked her to go and she refused.

(Testimony of Theodore Beasley.)

Q. In what manner did she refuse?

A. She absolutely gave me the understanding that she wasn't going to the hospital and not to call a doctor for her.

Q. Would you state whether or not there was any fight with her in regard to forcing her to go?

A. There was no cross words or anything. They seemed on good terms.

Q. Now, and then do you know what, if anything, was done regarding calling a doctor?

A. Didn't call a doctor there then. When she told me to leave the phone alone, not to call Doctor Weston, I left the phone alone. People's business is their own business. I [512] taken Curly down town then to the Red Cross Drug Store, returned to the Alibi Club with him and if I am not mistaken I think he picked up something at the J & A. I don't know what it was, on the way back.

Q. The J & A, that is the store in South Fairbanks?

A. Jim and Art's store. Cleared that trip at, let's see, 4:06 to 4:44, I believe it was, thirty-eight minutes. The ticket is over at the cab stand now. They have got it ready to bring up here in case you wish it.

Q. Did you testify at the coroner's inquest, Mr. Beasley?

A. Yes, sir.

Q. And was your testimony at that time materially different than it is now?

A. Practically the same as it is now. I wouldn't say word for word, because it has been quite awhile.

(Testimony of Theodore Beasley.)

Q. Do you know a cab driver named Jennings, Marvin Jennings?

A. Yes, sir, I knew the boy.

Q. You what? A. Yes, sir.

Q. How long have you known him?

A. I just know that he drove cab here during November, December and January if I am not mistaken.

Q. Do you know who he drove for? [513]

A. Drove for Radio.

Q. Do you know what he is doing at the present time? A. Sir?

Q. Do you know what he is doing at the present time?

A. I believe he is still driving cab, isn't he?

Q. I don't know. A. I don't know myself.

Q. Mr. Beasley, would you just state whether or not you have ever seen Beasley driving Miss Cathey in his cab prior to her death?

A. If I have seen what?

Q. Jennings hauling Miss Cathey in his cab?

A. I have seen them out together. I haven't seen them driving around in a cab, but I have seen them out together talking in clubs.

Q. Oh, they would be in a club?

A. Yes, sir.

Q. Just talking? A. Yes, sir.

Q. See them ever have drinks together?

A. I wouldn't say they had drinks together but I have seen them out in the clubs together.

(Testimony of Theodore Beasley.)

Q. Do you remember what clubs you seen them in, Mr. Beasley?

A. I think it was the Carnival Club which has changed its [514] name now to Club Northland, the Players Club and if I am not mistaken the Birdland. I am pretty sure it was Birdland.

Q. You, from what you saw of Miss Cathey when you went to the Alibi Club on the 22nd of January, did you think that her appearance cause you to believe that she could put up a fight against you and Mr. Urban in regard to going to the hospital?

A. Well, I couldn't say that she would put up a fight. I will say this, that when somebody tells you they don't want to call a doctor and they seem to know what they are talking about it is their business. It is not my business to mess in their affair. In fact, I don't like to haul people when they have been in a beef.

Q. Now, Mr. Beasley, do you know from your own knowledge, not from hearsay, any particular reason that Mr. Beasley would have of hauling Pat Cathey around in his cab?

A. I am Beasley.

Q. Or, no, Jennings, I meant Mr. Jennings?

A. That he would what, sir?

Q. Any particular reason that he would be hauling Pat Cathey around?

Mr. Stevens: That calls for a conclusion of the witness and I object.

The Court: I wonder if it doesn't assume some-

(Testimony of Theodore Beasley.)

thing not in evidence. Has that been this witness' testimony? [515]

Mr. Stevens: No, he said he saw them out together.

The Court: Night clubs as I recall.

Q. (By Mr. Taylor): Do you know what Mr. Jennings' common reputation is in the area in which he lives as to being a procurer for sporting women?

A. Well, I couldn't swear to it, sir, but they can find out from their own source if they want to.

Q. I ask you if you know in the area in which he lives, know his reputation there for being a procurer?

A. Yes.

Q. And what is that reputation?

Mr. Stevens: Good or bad.

Mr. Beasley: Sir?

Mr. Stevens: Good or bad?

Mr. Beasley: Bad.

Q. (By Mr. Taylor): Did you go back to Mr. Urban's home after the 22nd, Mr. Beasley?

A. Prior to her——

Q. To the Alibi Club?

A. When I cleared the trip the 22nd at 4:44 it was after her death before I made another trip back there.

Q. You never had another trip?

A. No, sir. [516]

Q. Did you see Mr. Urban during that time?

A. I saw him down town, I believe once or twice. I'm not sure. I think in the past a couple of times.

Q. Mr. Beasley, did you testify before the grand

(Testimony of Theodore Beasley.)

jury in this case? A. Yes, sir.

Q. And did you testify substantially as to what you have testified today?

A. Practically that is what I said today, sir.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Stevens:

Q. As you went in the Alibi Club there is a little room off on your left, isn't there?

A. That's right.

Q. That is the place that has the nickleodeon, isn't it? A. That's right.

Q. Place about ten-foot square?

A. Ten or twelve.

Q. Did you go in that room?

A. Into there?

Q. Yeah.

A. Well, you see, as you go in there is no partition there. You are actually in the club. There is actually no partition. When you are in the club you are in that room. [517] See the doorway is right here as you walk in, here is the place where the nickelodeon sits and here is the corner of the bar.

Q. The corner of the bar is on your right as you go in? A. That's right.

Q. And this was on your left?

A. That's right.

Q. Did you go in by the nickelodeon?

A. I didn't walk over to the nickelodeon, no.

(Testimony of Theodore Beasley.)

Q. Did you walk over to the bar?

A. I am even with the bar when I walk in.

Q. Did you step up to the bar?

A. No, see, here is the room right here. Here is the bar. I stood there.

Q. You didn't go in the room with the nickelodeon?

A. No.

Q. You didn't go up to the door of the bedroom?

A. The room which the nickelodeon is in and the bar are one and the same actually, as far as the club is concerned. I stood in this space there and talked to him and talked to Curly there.

Q. Where was Curly when you were talking to him?

A. Curly was standing over by the side of the bar in that little room.

Q. Did he stand by the bar? [518]

A. The bar and the room are one and——

Q. You don't mean the bedroom?

A. No, not the bedroom.

Q. You mean by the bar?

A. That's right.

Q. Did you go in by the door to Pat Cathey's bedroom?

A. No, I didn't go into Pat Cathey's bedroom.

Q. Was Curly in there when you were talking to him?

A. No, Curly was standing out there and asked her if she wanted to go to the hospital.

Mr. Stevens: That's all.

(Testimony of Theodore Beasley.)

Redirect Examination

By Mr. Taylor:

Q. Isn't it a fact, Mr. Beasley that Pat Cathey, or Cathey's bedroom does not open into the bar room to where the, right where the bar is, does it?

A. When you walk in the club the door goes straight in. Here is the bar like this right here. Right on your left is kind of an archway. Actually it is no arch, it is straight across, and the room is there. They are one and all the barroom and the little room where the nickelodeon is at, you might say one room and her little room is off to the side at the end of the room where the nickelodeon sets. You have to walk down the bar about four stools before you are by the place that would knock off vision there. [519]

Q. So, if you was going from the bar into the bar, then you would walk down about four stools, you would turn around that partition and——

A. If you were coming from the other end of the bar, opposite the door that you entered the club in.

Mr. Taylor: That's all.

Mr. Stevens: Thank you, Mr. Beasley. Would the Court like to take a recess now before we resume with Mr. Urban?

The Court: We haven't been in session very long.

Mr. Stevens: Well, we are prepared to go ahead.

The Court: Very well, let's proceed.

LEON D. URBAN

the witness on the stand whose testimony was interrupted to hear the testimony of the witness Beasley, resumed the stand for further cross-examination:

By Mr. Stevens:

Q. Now, Mr. Urban, did you see Mrs. Cathey's head just prior to the time she went to the hospital, during that week anytime?

A. What do you mean?

Q. Did you see it, did you have an opportunity to notice closely her head from the shoulders up?

A. From the day she went to the hospital?

Mr. Taylor: Just a moment, Mr. Urban, I think the [520] time should be established before you are required to answer that.

The Court: If I heard right I thought he said the week before she went to the hospital, but rephrase the question, Mr. Stevens.

Q. (By Mr. Stevens): At any time during that period from the 22nd to the 31st of January, did you have an opportunity to examine her head from the shoulders up?

A. Why certainly, talked to her every day.

Q. Did you see any bruises behind her ears?

A. Yes.

Q. Do you know how she got those?

A. No.

Q. Were those there when she came in?

A. Yes.

Q. She didn't get those when she fell off the

(Testimony of Leon D. Urban.)

bar stool? A. I don't know for sure.

Q. Isn't that what you told the nurse, that she got them when she fell off the bar stool?

A. I don't know.

Q. Did you know she had one behind each ear?

A. Through the week I did. I didn't know how she got them.

Q. Did you tell the little nurse she got that one behind the right ear by falling off the bar [521] stool? A. I didn't know for sure.

Q. Is that what you told her?

A. She asked me and I told them I don't know. I am not a doctor.

Q. Now, did Miss Cathey fall off a bar stool once or twice during that week from the 22nd to the 31st?

A. When she come home that morning she did. That is the only time she fell that I know of.

Q. She didn't fall off any time later?

A. No.

Q. Do you know a woman that is five feet tall, five-foot, three or four inches tall, weighs about a hundred thirty-five pounds, a brunette known by the name of Peggy? A. Not that I know of.

Q. Did you ever tell Mr. Goodfellow that description?

A. Not that kind of description at all.

Q. Did you tell him any description?

A. I told him there was a woman came in there, had an argument one time. That is all I said. I don't even know.

(Testimony of Leon D. Urban.)

Q. Did you tell him you had seen her?

A. No.

Q. Did you tell him you would recognize her -- pardon me, what is your answer?

A. I never told him anything about a woman. I told him she had a fight with a woman. [522]

Q. Did you tell him that you would recognize her? A. No.

Q. What was the reason you put Miss Cathey's name on your liquor license, Mr. Urban?

A. Well, she had to have a job. She would be a good bartender and good partner.

Q. A woman is not allowed to be a bartender unless her name is on the liquor license, is it?

A. I sold her half of it out there, license.

Q. Was half of the bar hers when she died?

A. Half of the license and what little was there. She had never paid anything. It was all on time.

Q. Just exactly what was your relationship to Mrs. Cathey prior to her death?

Mr. Taylor: Just a moment, we are going to object, your Honor, incompetent, irrelevant and immaterial, has no bearing upon this case.

The Court: I think he may answer.

Mr. Urban: Well, she was a partner. We went together. We went around together all the time.

Q. (By Mr. Stevens): Did you live together?

A. Part of the time.

Q. Were you married? A. No. [523]

Q. Did you intend to get married?

A. We had talked about it.

(Testimony of Leon D. Urban.)

Q. Did you admit to Mr. Wirth that you had roughed her up a couple of times?

A. Not in that way. I told him I had to get after her all the time to keep her sober.

Q. Now, on the night of the 21st she worked until about twelve o'clock, is that right?

A. That's right.

Q. And then she went down to the club, the Players Club, that right?

A. Well, I don't know where she went before she went there but she was at the Players Club.

Q. The next time you saw her she was at the Players Club? A. Yeah.

Q. And you brought her home about four o'clock, sometime thereafter, is that right?

A. She called me, told me she was at the Players Club.

Q. What time was it when she went out in the morning? A. What morning?

Q. The morning of the 22nd when she went out the door? A. Of the Alibi?

Q. Yeah.

A. Oh, around seven o'clock I guess, six-thirty.

Q. About three hours went past then, is that [524] right?

A. I wouldn't say for sure, something like that.

Q. Were you drinking all that time?

A. Oh, we was talking. I think we checked the register together. I was checking the register up.

Q. You had had considerable argument with her in order to get her home, is that right?

(Testimony of Leon D. Urban.)

A. Not too much.

Q. You stated she wanted to get out the other side of the cab when you started to leave the Players Club?

A. She didn't want to go home then, she wanted to stop again.

Q. Pardon me, that was the other side of the cab when you started to leave the Players Club, is that right?

A. She started to get out.

Q. She wanted to get out on the way home, but when she wanted to leave at seven o'clock in the morning you had no objection at all?

A. No use arguing with her. I talked to her, tried to get her to stay.

Q. She was about half-drunk when you walked into the Players Club that morning, isn't that what you said?

A. Well, fair. I wouldn't say she was too drunk.

Q. You let her leave about twelve o'clock that night, didn't you, to go out to the other bars?

A. Well, she asked me to work for her for awhile so I [525] went ahead and worked for her.

Q. But you didn't have any objection to her leaving?

A. Well, there was no use. She wanted to go some place. There wasn't too much business. I went ahead and worked.

Q. Did you you have any objection to her leaving, Mr. Urban?

A. No, I had no objection to her going. She asked me earlier if she could go at twelve.

(Testimony of Leon D. Urban.)

Q. You stated here this morning as a matter of fact there wasn't much point in keeping your bar open that time of year?

A. Well, sometimes a crowd come in, if you lose that crowd you get no more all night hardly.

Q. You state when she was half-drunk there was no use keeping her around anyway; you might as well get rid of her, let her go?

A. Let her go home?

Q. Leave the bar, wasn't it, wasn't that your testimony this morning when she was working for you, you might as well let her go to these other places? A. That's right.

Q. Is that what happened too that Friday night?

A. No, she wanted to go. She made arrangements to go out earlier. She told me when I come in the bar she was going to go at twelve.

Q. Were you open on Saturday? [526]

A. No.

Q. Well then, Mr. Urban, why did you insist so much on bringing her home that evening?

A. Well, I didn't want her to get out and get in trouble or get too drunk.

Q. Was she too drunk?

A. No, you'd leave her all night, she is going to get drunk.

Q. You stated she had been out all night before, hadn't she?

A. Yes, but I worried about her when she was out.

(Testimony of Leon D. Urban.)

Q. Wasn't it a fact you were jealous when she was out like that? A. No, I wasn't jealous.

Q. You had no feelings about her at all?

A. Well, I wasn't married to her. You can't have feelings about someone you are not married to.

Q. You can't be jealous of someone you are not married to? A. Well, not supposed to be.

Q. That is not the question, were you?

A. No.

Q. Did you know Mrs. Cathey before she came here? A. No.

Q. Now, you called the doctor Saturday night on the 30th, [527] did you not; is that correct?

A. On the 30th, no.

Q. I beg pardon, Saturday night was the 22nd, I'm sorry, you are right, the 22nd? A. Yes.

Q. And when he came there he told you there was nothing to worry about?

A. No, he just looked her over, sewed her lip up.

Q. Did he tell you to call him when she sobered up to see if she was all right then?

A. He said if she wasn't getting along all right.

Q. Did he mention sober up?

A. I wouldn't say for sure.

Q. Do you know?

A. I don't remember just what he did say.

Q. Wasn't it a fact that he did tell you when she sobered up if she didn't feel all right to call him?

Mr. Taylor: Just a moment, we are going to

(Testimony of Leon D. Urban.)

object. The question has already been asked and answered two or three times.

The Court: He said he didn't know.

Q. (By Mr. Stevens): Did you call him the next day? A. No.

Q. Did you call him Monday?

A. No. [528]

Q. Did you call him Tuesday?

A. She didn't want to call him. She was all right. She was O. K.

Q. That is not the question. Did you call him Tuesday?

A. The day I called him was either Tuesday or Wednesday for the pills. I don't know what day it was for sure.

Q. You sure it wasn't Sunday you called him for the pills? A. I won't say for sure.

Q. Didn't you just state here this morning that she was all right Sunday when she got up?

A. She was all right, yes.

Q. And she was getting along fine?

Mr. Taylor: Just a moment, your Honor, going to object unless he states what Sunday. It was a Sunday she went to the hospital.

The Court: Well, I think the witness knows, but you can make it more definite, Mr. Stevens, in view of the objection.

Q. (By Mr. Stevens): Sunday the 23rd. was she feeling all right? A. Yes.

Q. Did you have to call the doctor that day?

A. Well, the day I called the doctor was for the

(Testimony of Leon D. Urban.)

sleeping pills and she never did use any of them up. I don't know just [529] what day that was.

Q. She never did what?

A. She never did take any of them sleeping pills after that.

Q. I thought you said when you went to the base she got into the bottle?

A. He left four. I don't know what day I called.

Q. Did she get into the bottle and take some?

A. She had some out and one laying on the dresser in the other room.

Q. What day was that?

A. That was either Tuesday or Wednesday.

Q. Were you out at Ladd Base that day?

A. Yes.

Q. Was that the date you got the pills?

A. I don't know what day I got them.

Q. That is what I am trying to ask you. You said here this morning you got them on Wednesday.

A. I never said for sure. I said Tuesday or Wednesday.

Q. Do you know Mr. Wonderly?

A. Yes, sir.

Q. Was he in the Club Alibi between the 22nd and the 31st of January?

A. He might have been in on Friday or Saturday night. He has a key. I don't know for sure. He is the auctioneer there, [530] sale building, has the key for the toilets on the inside of the bar.

Q. How about Mr. Kirkpatrick, was he at the bar during that same period?

(Testimony of Leon D. Urban.)

A. I believe he was out on Saturday evening.

Q. And during the time that those two people were there, was Pat in the bedroom?

A. Yes.

Q. Was she groaning and moaning when they were there?

A. I never did hear her groan and moan.

Q. Not any time during that week?

A. No. She might have called for me or something, but she was groaning and moaning.

Q. You know Pat Surber?

A. I might know him. I don't know him by that name.

Q. It is a woman, the hat check girl at the Players Club.

A. When did she get to be a hat check girl down there. I never saw a hat check girl down there any time I have been there.

Q. Did you have to quiet down Miss Cathey at all as you drove down from the Players Club to the Alibi Club on the 22nd in Mr. Jennings' car?

A. Not that I know of.

Q. You said you had some words this morning, is that right? [531]

A. Oh, just average, wanted to get out. I might have scolded her, got after her, too.

Q. Did you say anything to her about sitting with the GI's at the bar?

A. I never saw no GI's at the bar.

Q. Did you say anything to her about sitting with some other men at the bar?

(Testimony of Leon D. Urban.)

A. I said something about she should come and sit with me when I buy a drink, at least say thanks

Q. You did say that? A. I think I did.

Q. Did you cuff her then?

A. I never cuffed her.

Q. Did you just slap her then?

A. I never slapped her.

Q. Then when Mr. DeWalt asked you what had happened to this woman you told him she had been in a fight with another woman, is that correct, on the night of the 30th of January, when you talked to Mr. DeWalt?

A. I answered that question once.

Q. I would like to have you answer it again.

Mr. Taylor: We object, your Honor, already been asked and answered.

The Court: It is repetitious but I am going to permit it in view of the broken testimony, in view of the [532] fact that his testimony was broken by the other witness.

Mr. Stevens: I don't think the ground of repetition is a good ground for objection on cross-examination anyway, your Honor.

The Court: I think it is Mr. Stevens. It could go on forever if it weren't.

Q. (By Mr. Stevens): Is that what you told Mr. DeWalt? A. What's that.

Q. That some other, that a woman had beaten her up?

A. Do I have to answer that question?

The Court: Yes.

(Testimony of Leon D. Urban.)

Mr. Urban: Well, I told him she had a fight with a couple of women, a woman and she had been in a deal, that's all I told him.

Q. (By Mr. Stevens): Then when Mr. Goodfellow asked you, did you tell him the same thing?

A. Yes.

Q. And that was, both of those times were prior to her death, is that correct?

A. That was before she died.

Q. Now, after she died did you talk to Mr. Goodfellow again? A. For a second. [533]

Q. The same night?

Mr. Taylor: Just a moment, Curly. I am going to object, your Honor. That has been gone into thoroughly by the District Attorney and it looks to me like it is just unduly tiring the jury and I know it is tiring me.

The Court: He may answer.

Mr. Urban: Talked to him at the police station.

Q. (By Mr. Stevens): Talked to him at the hospital before you went to the police station, didn't you?

A. I told you I did. That was before she died.

Q. Talk to him after she died up there?

A. Not at the hospital.

Q. It was Mr. Byrom you talked to after she died, is that correct? A. Yeah.

Q. Did you tell him the same story?

A. I just told him she had a fight with some woman.

(Testimony of Leon D. Urban.)

Q. That was after she died?

A. That is what I told him.

Q. That is right, that was after she died?

A. Yes.

Q. Then at the police station you saw Mr. Wirth and Mr. Goodfellow? A. Yes.

Mr. Taylor: If the Court please, could we have a [534] recess now?

The Court: Yes, we have been in session——

Mr. Taylor: I would like to call another witness out of turn. I have got to get her on this afternoon. She is going to the hospital tomorrow.

The Court: Well, the Court doesn't like to interfere with the government's cross-examination of the defendant. Upon a proper showing——

Mr. Taylor: The only showing I can make, your Honor, is this lady will not be available tomorrow. She is expecting to have an operation. She has been putting it off because she will be called in this trial, elderly lady, not very well.

Mr. Stevens: No objection, your Honor.

The Court: She is going to be hospitalized tomorrow for surgery? Members of the jury, once more I admonish you not to discuss this case with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; do not form or express any opinion until the case is finally submitted to you. We will recess until 4:30.

The Clerk: Court is at recess until 4:30.

(Testimony of Leon D. Urban.)

(Thereupon, at 4:20 p.m., the Court took a recess until 4:30 p.m., at which time it reconvened and the trial of this cause was [535] resumed.)

The Clerk: Court is reconvened.

Mr. Taylor: We will stipulate that all members of the jury are present, your Honor.

Mr. Stevens: We will stipulate that all the jurors are present, your Honor.

The Court: The defendant, I don't believe, I don't see him. Before proceeding with this witness' testimony, let the record show the presence of the defendant and his counsel and will the parties stipulate that all members of the jury are present?

Mr. Taylor: The defendant so stipulates.

The Court: And if that stipulation was overlooked at the last recess will you so stipulate?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Very well.

Mr. Taylor: Proceed?

The Court: Proceed, yes, Mr. Taylor.

MARIAN R. HETHERINGTON

a witness called in behalf of the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. My name is Marian R. Hetherington.

Q. Where do you reside? [536]

A. At quarters 4366, Apartment 8, Ladd Field.

Q. And how long have you lived in Alaska?

A. Approximately three years this time.

Q. And where has that residence been during?

A. Well, I lived at 212 Cowles Street with Martin and Lil Knuppe for fourteen months. I lived on Cushman Street a few months and then until we got quarters on Ladd.

Q. I take it you are married then?

A. Yes, sir, I am.

Q. And your husband working for the government at Ladd?

A. My husband is a service man, yes, sir.

Q. Now, are you employed?

A. Yes, sir, I am.

Q. And where are you employed?

A. I am employed at the War Surplus Store, 649 Third.

Q. And who is the owner of that store?

A. Leon Urban.

Q. And how long have you been employed there?

A. Since last October.

Q. Last October? A. Yes, sir.

(Testimony of Marian R. Hetherington.)

Q. And do you know if Mr. Urban has any other businesses?

A. Yes, sir, he does. He has the Alibi Club and an auction place at 23rd and Cushman.

Q. And what particular type of goods does he handle, Mrs. [537] Hetherington?

A. In which place?

Q. In all the places?

A. All of them. Well, pardon me, in the War Surplus store we have war surplus and some second hand items. Particularly men's working clothes, primarily the bulk of the merchandise.

Q. I take it then, Mrs. Hetherington, that you are acquainted with Mr. Urban?

A. Yes, sir, I certainly am.

Q. Did you know Pat Cathey during her lifetime?

A. Yes, sir, I knew her very slightly however.

Q. And when did you become acquainted with her?

A. Mr. Urban brought her in the store and introduced her to me as Pat the latter part of November, about the 18th or somewhere along in there. I don't know the exact date.

Q. And did you ever have any association with Pat Cathey after that? A. Oh, yes.

Q. What was the nature of the association?

A. She used to come in the store quite, every few days and either wait around there for awhile to get her hair fixed or on her way to get a steam

(Testimony of Marian R. Hetherington.)

bath or shopping and leave bundles there to pick up later.

Q. And during the other times when she wasn't making a [538] social call, would you state whether or not you had telephonic communication?

A. Oh, I have called out there numerous times. People come in making inquiries. They perhaps wanted a piece of used furniture or numerous things and a lot of those people have no transportation so consequently I would call out there to ascertain, see if they had it available out there for them, to save them a long walk.

Q. Did you ever have any social contacts with Miss Cathey? A. Yes.

Q. What was the nature of those contacts?

A. Well, I didn't know Pat Cathey, I didn't know anything about her. Everytime I saw her she was under the influence of, and during the Thanksgiving holidays why Don Dickey and numerous people around town trying, we were all trying to give the service men a dinner so I invited her and Mr. Urban over for Thanksgiving dinner. I had a twenty-pound turkey and I thought well, they had no place to have home-cooked dinner. I had them over there for Thanksgiving dinner.

Q. Now, calling your attention to the period between the 22nd day of January, 1955, and the 30, 31st, day of January, 1955, would you state whether you had any telephone conversation with Mrs. Cathey during those, that period?

A. Yes, sir, I did. [539]

(Testimony of Marian R. Hetherington.)

Q. And how many times did you talk to her?

A. Well, I don't think over twice.

Q. And I am not interested in what she said, but I was interested in her tone of voice and would you state just what her tone of voice denoted to you?

A. Well, it primarily it sounded like she had either laryngitis or sinus or very, very bad cold. It was very husky.

Q. I think you had about two conversations?

A. Well, I called to get Mr. Urban on the phone. I never talked to her very long because she knew nothing about our business whatsoever.

Q. But you——

A. She answered and would call Mr. Urban to the telephone, yes.

Q. And did, when you called there was it usually Pat Cathey that answered the phone during that period from the 22nd?

A. Oh, well, numerous times Curly would answer, either that or Pat or maybe sometimes Mr. Wonderly that runs the auction place out there, he would pick up the phone.

Q. Mr. Wonderly, he is the auctioneer, is he not?

A. Yes, sir.

Q. He has been an auctioneer for quite a long time. And did you ever learn that Miss Cathey had been injured? [540]

A. Why, I didn't know that she had been injured until the day that she expired.

(Testimony of Marian R. Hetherington.)

Q. And about how long was it before the 31st of January that you had your last talk with her?

A. Oh, it was right, right after Christmas. I couldn't tell you the exact date, sir, to save my life I couldn't.

Q. No, I mean between the 22nd of January and the 29th of January, '55?

A. Oh, January. Oh, I probably saw her once maybe. Not over that I'm sure.

Q. And how close to the 31st of January would that be?

A. Oh, sir, I couldn't tell you definitely.

Q. Pretty hard for you to remember?

A. Yes, because I had no reason to fix a date in my mind.

Q. Mrs. Hetherington, have you ever had the opportunity since you have known both Mr. Urban and Miss Cathey to observe Mr. Urban's attitude toward Miss Cathey, just answer that yes or no?

A. Well, Mr. Urban in my estimation has always been very nice to her and very courteous to her and she always was grateful for everything he had done for her. She always spoke very highly of him, that he was very good to her.

Q. Did you know Miss Cathey's condition when Mr. Urban took her into the——

A. Only what Miss Cathey told me, that, Pat said she [541] didn't have any money or didn't even have a pair of shoes on her feet when she asked Mr. Urban to give her a job. I couldn't prove

(Testimony of Marian R. Hetherington.)

it. That is all she told me. That is what she told me. I don't know.

Q. And just, did you ever, any question of marriage between the two parties?

A. Well, frankly, I do know that he thought an awful lot of her and wouldn't have surprised me had he come in and told me. He used to tell me all the time, I'm going to get married again. I never did take him serious because I thought he is old enough to know what he wanted to do.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Stevens:

Q. You stated you didn't know until the day Miss Cathey died that she had been injured?

A. No, sir, I did not.

Q. Whom did you find that out from?

A. Curly, when he came from the, apparently the hospital or some place after I opened the store that morning.

Q. And where was it, over at the store?

A. Yes, he came in in the morning.

Q. That was the morning after?

A. The same morning that she expired, either the night before or whenever she expired. I don't know when she expired. [542]

Q. Have you ever been a nurse, Mrs. Hetherington?

A. Yes, I was a nurse for the government.

(Testimony of Marian R. Hetherington.)

Q. Did any part of your conversation that day pertain to the bruises that Miss Cathey had?

A. Well, Mr. Urban came into the store and he looked very, as if he hadn't had any sleep for a terrifically long time, unshaven and what have you. First thing I said, Mr. Urban—pardon me, but prior to that he had been in the store, I think only once during that week and stated that he and Pat both had a terrific case of flu. And I said she sounded like she was ready for the hospital. He said, "She won't go to the hospital, the doctor has given her a shot." So when he came in the store that morning, I said, "How is Pat?" He said, "Oh, she is dead." I said, "Cut out the jokes now, how is Pat?" He said, "I'm not joking, she died this morning." I said, "Died this morning, where?" and he said, "In the hospital." And I said, "I didn't realize her cold was that bad. Shouldn't she have gone to the hospital before?" He said she wouldn't go because she knew it would cost money and "we didn't have too much money." And he said, well, I said, "Exactly what happened?" and then he told me she had gone out to some club or something. He said, Probably it was his fault, he shouldn't have let her go out of the club, the building and come back and she had been beaten up and had a cut on her lip and the doctor had sewn it up and given her a shot and said she would be all right, and I said, "Well, you didn't get drunk and hit her, did you?" [543] He said, "No." He said, "I might have cuffed her around a little bit once in awhile when

(Testimony of Marian R. Hetherington.)

she had had too much to drink." He said, "I wouldn't hurt her," which he was always awfully good to her. He said, "I thought an awful lot of that girl." I said, "I know you did, Curly." I didn't realize, it was such a shock.

Q. Did any conversation concerning the ring he had on?

A. He said, "I might have cuffed her around a little bit. I wonder if my ring hurt her." I said, "Oh, well, in my nursing career a person could ascertain whether a person was hit with an instrument or with a fist." He said, "I never hurt her in my life." I said, "I know you haven't, Curly." That is all that was said. He was very, very——

Q. Do you know Betty Harris? A. Yes.

Q. Have you seen Mr. Urban recently concerning Betty Harris?

A. Oh, yes, he was in the store. He wanted to know if Betty was going out to my house, stay there room and board out there for awhile, and I said she lived so far out and he said she was trying to get her citizenship papers and wouldn't go too good if she was known, I mean in getting her citizenship papers if it would come out that she was associated with a character, a prostitute like Pat. [545]

Q. When was that that he saw you?

A. Oh, that was three or four days ago, I guess.

Q. The 20th of this month?

A. Well, what is today? Just three or four, some time a few days ago is all.

(Testimony of Marian R. Hetherington.)

Q. Did he ask you to take Betty Harris out to Ladd Field?

A. Yes. He said, "I want you to take Betty out to your house for a couple of weeks." I said, "I can't take boarders and roomers out there." I have to cope with the post laws and rules and regulations. He seemed to be interested in Betty getting her citizenship papers and wanted nothing to be thrown in there to keep her from getting there.

Q. You going to the hospital tomorrow?

A. Yes, I have an appointment at one-thirty. I will be there approximately an hour.

Q. You going to have surgery tomorrow?

A. No, sir, not for approximately a couple of weeks anyway.

Q. How long have you worked for Mr. Urban?

A. Since last October, October the 4th. I do know, maybe I am out of order. If I am, will you stop me. I do know that he bought her winter clothing and all. The kid didn't have anything. Matter of fact is I volunteered on my own to buy her proper clothes for burial. She didn't even own a dress.

Q. You bought those, didn't you?

A. Out of my own pocket, yes. [545]

Mr. Stevens: Your witness, Mr. Taylor.

(Testimony of Marian R. Hetherington.)

Redirect Examination

By Mr. Taylor:

Q. You say you bought the burial clothes?

A. Yes, sir, I did. I volunteered. He didn't ask me, nobody asked me.

Q. Mr. Urban request that?

A. No, I volunteered. I come out and said, "Curly, does she have anything decent to be buried in." He said some slacks and sweaters. I said, "I will buy the dress." He said you take twenty dollars out of your till and buy some flowers so I bought the proper apparel for her to be sent back home in.

Q. Oh, yeah, Mrs. Hetherington, in talking with me, you had talk with me a few days ago about this, did you not?

A. When I was in your office, yes.

Q. You told me you expected to go to surgery?

A. Well, they had postponed it. They said they would have to postpone it for, I'm not ready for surgery as yet.

Q. When you told me you was going to the hospital tomorrow, not for surgery?

A. No, not for surgery.

Q. I believe you told me you would not be available?

A. I said I definitely had to keep that appointment because they had some consulting doctors in from Anchorage on [546] my case. Therefore, I

(Testimony of Marian R. Hetherington.)

have to be there at one o'clock. I don't think it will take over an hour though.

Mr. Taylor: That's all.

Mrs. Hetherington: May I leave the premises now, sir?

Mr. Taylor: Yes, I have no objection, Mrs. Hetherington.

Mr. Stevens: Thank you, Mrs. Hetherington. Oh, just one more question, Mrs. Hetherington.

Recross-Examination

By Mr. Stevens:

Q. Did Mr. Urban tell you why he wanted to tell you to take Betty Harris out to your place?

A. Well, no, primarily he seemed her, wanted her taken care of. I don't know whether he didn't want her in the court or what the dickens he wanted.

Q. Did he tell you he did not want her to testify?

A. No, he stated he was afraid for her to testify because she tried to get her citizenship papers, it may go against her case by her associating with a prostitute.

Mr. Stevens: Thank you.

(Witness excused.)

The Court: Will counsel please approach the bench?

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:) [547]

The Court: This matter doesn't pertain to the merits of the case. Here is a note to one of the jurors there is a forest fire across from your house, across the line near Creamers. Someone telephoned that.

Mr. Stevens: Why don't we take the recess now? It is only twelve minutes. That would be perfectly all right with me.

The Court: Very well.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:)

The Court: Members of the jury, I don't think there is any emergency but we have reached nearly five o'clock. There is a message for one of the jurors. We will recess until ten o'clock but I wish to again admonish you not to discuss this matter with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion until the case is finally submitted to you.

Mr. Stevens: In view of Mr. Taylor's objections, we would like to withdraw Government's Identification 20.

The Court: It may be withdrawn. You folks are excused until ten o'clock tomorrow morning.

The Clerk: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 4:50 p.m., the trial of this cause was adjourned until May 24, 1955, at 10:00 a.m.) [548]

Be It Remembered, that upon the 24th day of May, 1955, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding.

The Court: Let the record show the presence of Mr. Urban, the defendant, and Mr. Stevens. Mr. Miller, do you wish to wait for Mr. Taylor?

Mr. Miller: If the Court please, he was around in the Clerk's office when I left. He had a subpoena.

The Court: Well, we might proceed with the polling of the jury.

Mr. Miller: Yes, sir.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Very well. Defendant ready to proceed?

Mr. Miller: The defendant is ready, your Honor.

The Court: The government is ready?

Mr. Stevens: The government is ready, your Honor.

The Court: You may proceed.

LEON D. URBAN

the witness on the stand whose testimony was interrupted to hear the testimony of the witness Hetherington, resumed the stand for further cross-examination: [549]

By Mr. Stevens:

Q. Mr. Urban, following the time that Mrs. Cathey left the Alibi Club on the 30th of January, who stayed in that room that she had been in?

A. What do you mean who stayed in there? Lived there?

Q. Did you stay in it? A. Yes.

Q. At night? A. Yes.

Q. Was there anyone else living there during that time, following that day?

A. Nobody lived there, no.

Q. Did you keep the door locked when you weren't there?

A. I always have a snap or a lock on it especially if I have papers back there on the sale, always figured the sale up there.

Q. When you weren't there, did you keep the door closed and locked? A. Yes.

Q. Was the door of the club locked when you weren't there?

A. I always keep the door of the club locked when I am not there unless there is a bartender.

Q. Between the 31st of January and the 26th day of February when the group of officers came down there, was there [550] anyone living in there besides you in that room? A. No.

(Testimony of Leon D. Urban.)

Q. Do you know whether any person had a fight in there after Mrs. Cathey left?

A. Well, there was no fight in there that I know of.

Q. Was there anyone else in there besides you?

A. No. The bartender lived there while I was in jail, but I mean when I was——

Q. That was after the 26th day of February, is that right?

A. Well, he lived there all the time while I was arrested and in jail.

Q. But it was after you were arrested, was it not?

A. Yes, sir, anybody lived there, yes, sir.

Q. Now then, after the 22nd day of January and between that day and the 26th day of February of this year, did you ever look around in that room?

A. Same as it always was.

Q. Did you ever notice the walls of that room?

A. I never did look at it.

Q. Did you take Mrs. Cathey's things out of the drawer when they went out of the drawers there, the chest of drawers when they were sent down to her home?

A. Mrs. Hathaway, the lady that testified here yesterday, [551] Marian, I can't pronounce her name, she is the one.

Q. Mrs. Hetherington?

A. Hetherington. She helped put them away.

Q. Did you help? A. Yes.

Q. Did you put your own things into that drawer after her things were taken out?

(Testimony of Leon D. Urban.)

A. Some of my dirty clothes have been in it, bartenders clothes have been in it.

Q. Did you put your clothes in the chest of drawers that was at the foot of the bed?

A. I have always used that one for mine.

Q. You have always used that one for your chest of drawers? A. Yes.

Q. That is a three-drawer chest of drawers, is that correct?

A. Well, in the last three or four months I have probably had fifteen of them in there. I haven't even got any of them now in there. Got one out in the other building.

Q. The one that was there on the 26th day of February, was that the one in there when Mrs. Cathey was there?

A. I think I bought it last winter some time. I bought it on a sale. [552]

Q. Did you ever look in the second drawer of that chest of drawers?

A. Never paid any attention if I did.

Q. Were you there when we looked into it?

A. No.

Q. Well, if there was some blood in that drawer, do you know how it got there?

Mr. Taylor: Just a moment, your Honor. We are going to object to the question on the grounds that a 26th day of February, your Honor, would be a little bit late.

The Court: I think he may inquire.

Mr. Taylor: No foundation laid for any search

(Testimony of Leon D. Urban.)

or inspection of his, of that man's room on the 26th day of February.

The Court: He is merely inquiring of this witness, however. I think he may answer if he knows.

Mr. Urban: I think Mr. Taylor looked the other night out there.

Q. (By Mr. Stevens): My question was, if there was some blood in there on the 26th day of February in the second drawer of that chest of drawers, would you know how it got there?

A. No, I wouldn't.

Q. And do you have that—— [553]

Mr. Taylor: Your Honor, I am going to object to this line of questioning. There is no testimony in this case as to any blood in any drawers in that place or as to whether, they haven't showed whether the drawers that was in there at the time of, that Mrs. Cathey died was in there on the 26th day of February.

The Court: Sustained at this time.

Mr. Taylor: The objection came after the answer, your Honor. Ask that the answer be stricken.

The Court: Let's have the question and answer.

(Thereupon, the reporter read the question.)

The Court: Sustained. Proceed.

Mr. Stevens: Your Honor, I am a little at loss to understand what was sustained. I mean——

The Court: Mr. Taylor is objecting to further questioning concerning blood as I understand his objection.

(Testimony of Leon D. Urban.)

Mr. Taylor: Upon the grounds that there is no testimony has ever been given, your Honor, in the case so far as to any blood in that room, so it would be improper cross-examination.

Q. (By Mr. Stevens): Mr. Urban, this is Government's Identification 19, you have examined that previously?

A. This is the chest of drawers she used.

Q. The question, Mr. Urban, have you examined this previously? [554]

A. I saw it the other day. I never paid any attention to it.

Q. You examined it when you were sitting at the table with Mr. Taylor, didn't you?

A. Just looked at it.

Q. Would you care to look it over now, please?

A. It don't look much like the room. This here is the chest of drawers that she always used for herself.

Mr. Taylor: Don't testify to that. Just say what it is.

Mr. Urban: That is partly of the drawing of the room.

Q. (By Mr. Stevens): Is there any significant error in that drawing?

A. Well, it ain't drawed out like the room should be at all. Corner there for the toilet. It could be any kind of a drawing.

Q. Does it show the location of the bed in the room? A. That's right.

(Testimony of Leon D. Urban.)

Q. Is that the approximate size of the room?

A. About seven feet by a little over nine feet. Something like that, yes.

Q. That is the approximate size of the bed?

A. Well, it is a regular roll-a-way bed. Regular double roll-a-way bed. I wouldn't say the size.

Q. And this, item "A," was there a night stand in there [555] behind the door? A. Yes.

Q. And there was a chest of drawers to the left right inside the door as you came in?

A. Yes.

Q. And another set of drawers at the foot of the bed? A. Yes.

Q. And you have a closet at the left end of the room as you enter? A. Yes.

Q. The only significant difference then is this square at the upper-most portion that is part——

Mr. Taylor: If the Court please, I am going to object to any further cross-examination about this until the proper foundation has been laid to be introduced in evidence. It is certainly not an exhibit now.

The Court: I think that counsel is attempting to do that. He may proceed.

Mr. Taylor: It is improper cross-examination, your Honor. They attempted to get it in the other day. It was refused.

The Court: Overruled.

Q. (By Mr. Stevens): Now, is there a mirror right over the chest of drawers that is right inside the door to the left in that bedroom? [556]

(Testimony of Leon D. Urban.)

A. Yes.

Q. And are you familiar with that general area of the room? A. Yes.

Q. Prior to the time that the officers came there, did you notice any spots on that wall by the mirror?

A. I never noticed any.

Q. Do you know whether there were any?

A. I never saw any.

Q. And the wall that was up to the head of the bed, faced up against the wall, is that right, head of the bed was to the right as you went in the door?

A. Yes.

Q. And there was a little light up above that bed, is that correct? A. Yes.

Q. Were you familiar with that light during that period of time between the 22nd of January and the 26th of February?

Mr. Taylor: Just a moment, your Honor. I am going to object to the, to any further questioning along this line, incompetent, irrelevant, immaterial. The proper foundation has not been laid. It is improper cross-examination, as it has not been gone into on direct examination, your Honor; there has been no testimony by the government as to the matters, that they are now seeking to elicit from this witness and I am going to advise the witness, this witness not to answer. If they are attempting to incriminate himself, your Honor, we, which they are trying to do, I am going to advise him not to answer the questions.

(Testimony of Leon D. Urban.)

The Court: The objection is overruled. He may answer.

Mr. Taylor: I am going to advise you, Mr. Urban, that if you feel that the answer tends to incriminate you that you don't have to answer.

Mr. Stevens: Respectfully, your Honor, I don't believe there is such an objection. When the defendant takes the stand in a criminal case he waives his privilege against self-incrimination.

The Court: The court has ruled and Mr. Taylor is merely informing him.

Mr. Urban: Can I just say one thing? That room I used for a storeroom when I bought the place out there. The paper is still on it, the same, never been changed outside of black paint putting on the glass. I bought that place two years ago in April, or in November and the room was used for a storeroom. I don't know what is on the wall. I never saw no blood on the wall or anything like that. We can go out and look at it. We will take the jury out. There has never been a thing touched. It has never been painted and as far as chest of drawers, I have probably owned in the last year five hundred chest of drawers and I sold one out of there the other day, I put another one in. Somebody wants a chest of drawers, I had a little desk I kept the desk in there part of the time. Sometimes I have it out in the other building. At the present time I have a desk in there. I put in in there two weeks ago, a week ago last night I put it on the auction sale. If there is blood in the drawers of that I never ever looked in

(Testimony of Leon D. Urban.)

it. I don't think there is any clothes. I just bought it on sale. That is the same way I got ahold of those other two chests of drawers, the same way as the mirror. I got it on the sale. I can show you on the books.

Q. (By Mr. Stevens): Did you ever turn on that light between the 22nd day of January and the 26th day of February of this year?

A. I imagine.

Q. That is the light above the head of the bed?

A. That's right.

Q. You never noticed anything on the wall?

A. Never paid any attention.

Q. Did you see anything on the wall before that time?

Mr. Taylor: Just a moment, don't answer that question. I am going to object, your Honor, to the form of the question as it presumes that he had seen blood later where the answer has been no. Don't answer the question.

The Court: It is clear that he says he did not see [559] the, anything there during that date. Now, he is asking the questions, whether he noticed anything there before the date. I don't think it implies that he didn't see it after. He may answer.

Mr. Urban: Not that I ever saw, never even looked.

Q. (By Mr. Stevens): That is before the 22nd of January you never saw anything there before then, did you?

A. I never saw it afterwards or before.

(Testimony of Leon D. Urban.)

Q. Now, you stated, did you not, that Mr. Jennings had been personally acquainted with Miss Cathey?

A. Well, I know different times she called for number twenty cab.

Q. Did you see Mr. Jennings with Miss Cathey at any time?

A. He was in the bar a few times. I don't know him personally.

Q. But did you see him with her?

A. I saw him come pick her up.

Q. And did you see him out at any other place?

A. Not that I recollect. As far as cab drivers talking to people when I am at the bar.

Q. Never mind what the cab drivers said, Mr. Urban. Did you see Mr. Jennings with Miss Cathey at any other place, at any other time other than in your bar?

A. Not that I remember. [560]

Q. You had seen Mr. Jennings in your place?

A. Yes.

Q. And did Miss Cathey say hello to Mr. Jennings when you got into his cab that night on the 22nd?

A. I don't remember.

Q. It was the morning, rather. Did she recognize him at all?

A. I won't say. I don't know.

Q. Did you recognize him?

A. I never paid any attention to who was driving the cab.

Q. Did you ever ask Mrs. Cathey who had administered this beating?

A. I asked her different times.

(Testimony of Leon D. Urban.)

Q. When was the first time?

A. When she come home.

Q. Was that the time she told you about the woman?

A. That is when she told me, I told her she would have to go to the hospital and I said Pat, who done it?

Q. And what did she say?

A. She said she would take care of all of her own beefs, her own troubles.

Q. Did she tell you who did it? A. No.

Q. When was the next time you asked her?

A. I asked her the next morning, too, talked to her. [561]

Q. Did she tell you who did it then?

A. No.

Q. When was the next time you asked her?

A. I wouldn't say that, I talked to her different times. She wouldn't say a word.

Q. Was she up and around on Monday?

A. Yes, she went to the toilet and the rest room.

Q. Did you talk about her condition on Monday?

Mr. Taylor: Just a moment, I am going to. it is an indefinite question, your Honor, talk about her condition. I think who the conversation with should be brought forth first.

The Court: Well, in view of the objection you will rephrase your question.

Q. (By Mr. Stephens): Did you talk to Mrs. Cathey about her condition on Monday, that would have been the 24th?

(Testimony of Leon D. Urban.)

A. I told her we should call the doctor.

Q. Did you ask her then who had beaten her?

Mr. Taylor: What was that answer? Would you read the answer, please?

(Thereupon, the reporter read the last answer.)

Mr. Urban: She said she didn't need the doctor, she was all right. [562]

Q. (By Mr. Stevens): The question was, did you ask her who had beaten her when you talked to her on Monday?

A. I asked her who done it and where she was at.

Q. Did she tell you? A. No.

Q. And on Tuesday, did you talk to Mrs. Cathey again about her, the beating?

A. Oh, I talked to her every day as far as that goes.

Q. Well, on Tuesday did she tell you on Tuesday? A. She didn't tell me nothing.

Q. Did she tell you on Wednesday who had beaten her? A. She never told me who.

Mr. Taylor: Your Honor, I think this is silly, repetitious. He already stated he had talked a number of times during the week and I think it is improper.

The Court: I think the government may inquire of the witness.

Q. (By Mr. Stevens): Did she tell you on Wednesday who had beaten her?

(Testimony of Leon D. Urban.)

A. She never did tell me.

Q. She never did tell you? A. No.

Q. Well, where did you get the story about the woman?

A. That was when we was going to call for the doctor, first story. [563]

Q. Which time that you were going to call the doctor? A. What do you mean?

Q. You called for the doctor twice; was it on Saturday, the 22nd or Sunday, the 30th?

A. What do you mean Sunday, the 30th?

Q. Sunday the 30th of January you called the doctor, didn't you?

Mr. Taylor: Just a moment. I think Mr. Stevens should be sworn if he is going to testify, your Honor.

The Court: He may inquire.

Mr. Urban: I told her we was going to have to call the doctor on the 22nd.

Q. (By Mr. Stevens): Which time was it that she told you it was a woman that beat her up?

A. On the 22nd.

Q. I thought you just told us that she didn't tell you then who beat her up?

A. She said we will have to tell that story.

Q. What did she tell you then on the 22nd?

A. She just said if they ask you tell a woman beat me up. That is all she said.

Mr. Taylor: Your Honor, we are going to object. This is repetitious. It has been gone into before on cross-examination [564] by Mr. Stevens. It is

(Testimony of Leon D. Urban.)

taking up the time of the Court and the jury and everybody else.

The Court: Overruled.

Mr. Taylor: He has been cross-examined fully on this matter.

The Court: Overruled.

Q. (By Mr. Stevens:) Now, on the 30th did you have any conversation with Miss Cathey concerning her going to the hospital?

A. No, she was all right. She was feeling good in the afternoon.

Q. Was she feeling all right just before this time when her back popped on the 30th?

A. That's right. She asked me to rub her back.

Q. Did she talk to you about going to the hospital then?

A. She didn't know she had to go. She was all right then.

Q. Did she say anything about what you were to tell the doctor?

A. No.

Q. Did you ever talk again about this business of what you were supposed to say when she went to the hospital?

A. No, I just asked her where she had been when she got beat up.

Q. So the only time you talked to her about this story [565] about the woman is Saturday, the 22nd, is that correct, Saturday night, the 22nd, just before you called the doctor?

A. Well, she mentioned it. She said if I have to go to the doctor that is what you tell them.

(Testimony of Leon D. Urban.)

Q. But is that the only time, Mr. Urban?

A. Yes.

Mr. Taylor: Let Mr. Urban finish the question, please. We are going to object to the District Attorney interrupting the witness when he is answering a question.

The Court: Proceed.

Q. (By Mr. Stevens): Did you finish your answer, Mr. Urban? A. Yes.

Q. You didn't talk on the 30th then concerning this story about the woman with Mrs. Cathey?

A. No.

Q. Did you tell the corner's inquest that that was the time that she told you to tell the story was just prior to the time she was taken to the hospital on the 30th? A. I don't remember.

Q. And the time that she told you to tell this story, did she tell you what name to use?

A. No.

Q. Were you asked by the coroner's inquest, the jury, what the girl's name was in this story? [566]

Mr. Taylor: Just a moment, don't answer that. Going to object to it, your Honor, upon the grounds it is improper. He should ask the, what question was propounded to this witness and if he interposed, returned a certain answer, your Honor.

The Court: The difficulty is, Mr. Taylor, that there was no official record. I will permit counsel to proceed.

Mr. Taylor: Mr. Stevens is reading from a record, your Honor.

(Testimony of Leon D. Urban.)

The Court: We were speaking of an official record and I think that counsel has a right to attempt to prove inconsistent prior statements. You may proceed.

Q. (By Mr. Stevens): Mr. Urban, you were under oath——

Mr. Taylor: Just a moment, could I inquire of the Court a question?

The Court: Certainly.

Mr. Taylor: How would he prove them, your Honor, if there was no previous record of the case?

The Court: Persons present that may have heard them.

Q. (By Mr. Stevens): You were under oath before the coroner's inquest, were you not?

A. That's right.

Q. And were you asked what the girl's name in that story was? [567]

A. I don't remember.

Q. Did you tell them that the girl's name was Peggy or something like that?

A. Not that I remember.

Q. Directing your attention, Mr. Urban, to the occasions you have testified about concerning Mr. Beasley called to the Alibi Club on the afternoon of Saturday, the 22nd, was there a conversation then between you and Mrs. Cathey concerning who had beaten her up?

A. We just asked her is all.

Q. Did she tell you who had beaten her up?

A. No.

Q. Did you ask her when Mr. Beasley was there?

A. Yes.

(Testimony of Leon D. Urban.)

Q. What did she tell you? A. Said——

Mr. Taylor: Just a moment, your Honor, would be hearsay.

The Court: He may answer.

Mr. Urban: She said she would take care of all of her own troubles. She didn't want to get me involved or the place involved in any troubles.

Q. (By Mr. Stevens): Did she mention the woman at that time?

A. She never said anything then. [568]

Q. Pardon?

A. She never said anything in front of him.

Q. She didn't say anything about who did it in front of Beasley?

A. I'm sure she just said she would take care of her own beefs, all of her own troubles. I know she told him to leave the phone alone.

Q. Did the coroner's jury ask you what she had told you at that time?

Mr. Taylor: Just a moment, your Honor. We are going to object to what a jury, a question the jury asked, your Honor, as it is the record would be the best evidence.

The Court: There is no record, but he might be asked whether he was asked that question or not in the coroner's inquest.

Mr. Taylor: I think, your Honor, that it should be specific, the wording of the question.

The Court: Proceed, Mr. Stevens.

Q. (By Mr. Stevens): Well, were you asked specifically by the coroner's jury if you knew any-

(Testimony of Leon D. Urban.)

thing about this other woman that she told you had beat her up?

A. I don't remember just how it was asked.

Q. Did you tell the coroner's jury that while Beasley was there she said, "I had my money taken away from me by a trick"? [569]

Mr. Taylor: Just a moment, your Honor. We are going to object as the question is not properly put and it is leading question if it was put that way and I believe it would be incompetent, irrelevant to this case.

The Court: Well, it becomes difficult for the Court in view of the prior objection that the record would be the best evidence and the proper way for the government attorney to proceed whereas the Court has not construed the testimony in the coroner's inquest as being an official record, so the examiner is placed in a peculiar position, and so is the Court by your objection, Mr. Taylor.

Mr. Taylor: Well, I am certainly put in a peculiar position, by Mr. Stevens in attempting to pursue this line of questioning. He would be put under the same obligation to ask the question if he returned such and such an answer to a question which was propounded by the, either the District Attorney or members of the coroner's jury. He is required to do that regardless of whether he has got a record, his own record here that he made or whether he has got the official record, or if there was no record at all. He is still confined to what the

(Testimony of Leon D. Urban.)

answer was. He is attempting to impeach, your Honor, that is the only way he can impeach.

The Court: He can impeach by asking him on a prior occasion whether he made a certain statement.

Mr. Taylor: That would be a statement in response to [570] a particular question, would it not?

The Court: Well, if we had a record that would be true, but there being no record the counsel cannot refer to the record except by your urgency that is the only time that he has referred to the record that he has before him, as I understand. Mr. Stevens, is that right?

Mr. Stevens: That's right, your Honor, I am attempting to do what Mr. Taylor has asked me to do. We have offered this record to Mr. Taylor and he, and we agree that it is not official in the sense of an, in the sense it was officially reported, but I don't see how we can do it otherwise. I have asked particularly the question which was asked and then asked Mr. Urban particularly the answer, if he gave that answer.

Mr. Taylor: Well, I have no objection if he will pursue it that way, if he will ask him if to a certain question did he return a particular answer and read it. I don't care whether——

The Court: Well, Mr. Stevens, Mr. Taylor has explained the procedure to which he will have no objection. If you will ask the witness if he was asked a specific question and if he gave a specific answer. Is that right, Mr. Taylor?

(Testimony of Leon D. Urban.)

Mr. Taylor: That's right, your Honor. That is the proper way.

Q. (By Mr. Stevens): Well, then, Mr. Urban, were you asked specifically, [571] "and you don't know anything about this other woman that supposedly beat her up"; do you recall that question in the coroner's inquest?

A. I don't remember just how they did ask it.

Q. Do you recall that general subject of conversation down there?

A. Yes, but I don't recall just what was said.

Q. Did you then answer specifically, "no, that was just talk because she said, told me that she was beat up by a trick"?

A. Well, she would say she was beat up or robbed or something. I can't tell you just how it was said there.

Q. When was it she told you that she was beat up by a trick?

A. I don't remember if she did say it that way or not.

Q. Well, is that what you told the coroner's inquest?

A. I don't remember just how I did tell them that.

Q. If you told them that, was that the truth?

A. That's right.

Q. When did it happen then?

A. I don't remember just how she did say it.

Q. Well, when was there any conversation between you and Mrs. Cathey concerning a trick?

(Testimony of Leon D. Urban.)

A. Next day I wanted to know what happened and why she got all beat up. [572]

Q. And that was on Sunday?

A. Yes, Sunday evening.

Q. By what do you understand a trick to mean?

A. Guys looking for a girl.

Q. That means an act of prostitution, doesn't it?

A. That's right.

Q. And did she talk to you about an act of prostitution on Sunday?

A. I asked her why she went out anyway to start with. That is the only question I remember asking right now. The way it was said on the coroner's jury I can't say for sure.

Q. But did she tell you on Sunday that she had been beaten up by a trick?

A. She never said before she said they took my money. I presumed it was a trick.

Q. She never told you then it was a trick?

A. She never told me who it was or how it was done or anything. She never would answer.

Q. What about this story about the woman?

A. She told me——

Mr. Taylor: Just a moment; just a moment. Are those questions in that record that you are asking, Mr. Stevens?

Mr. Stevens: Mr. Taylor, obviously those questions aren't in the record. [573]

Mr. Taylor: I understood that he was to read the question and ask if he returned certain answers.

(Testimony of Leon D. Urban.)

The Court: He did that, Mr. Taylor, and now he is going into general cross-examination.

Mr. Stevens: There were just two questions from the record and I obviously read them directly.

Q. (By Mr. Stevens): What about the story about the woman, didn't she tell you that?

A. That is what she wanted to tell the doctor if she had to go to the hospital.

Q. That was on Saturday night, the 22nd?

A. That was in the afternoon.

Q. It was before the doctor came on the 22nd then? A. That's right.

Q. Did she ever mention a trick to you?

A. Well, I don't know if she called it that or not.

Q. Well, what did she call it?

A. I don't remember just how she did say it.

Q. Now, Mr. Urban, do you remember what she said to you when she came into the bar on the morning or the early afternoon of the 22nd, don't you?

A. She said, well, she took all my money, too. She finally found four bits in her pocket. She said, "I want to buy a drink." That is all that was ever said. [574]

Q. Did she mention the word trick to you then?

A. I don't remember just how she did say it.

Q. Did she imply to you that she had been beaten up by a trick?

Mr. Taylor: Just a moment, your Honor, we are going to object to that, be calling for a conclusion, your Honor, as to what somebody else meant.

The Court: Well, Mr. Taylor, the word trick

(Testimony of Leon D. Urban.)

has been used and the examiner is trying to find out.

Mr. Taylor: Well, the examiner is trying to find out what this man thought somebody else meant.

The Court: Well, he is trying to find out how if the witness did use the word trick, he is trying to find out why he used it. He may proceed.

Mr. Urban: I don't remember how I said it.

Q. (By Mr. Stevens): Well, then, this story about the trick that was your idea, is that right, Mr. Urban? A. No, sir.

Mr. Taylor: Object to the question, your Honor. Don't answer it.

Mr. Stevens: He already answered it.

Mr. Taylor: What was the answer.

(Thereupon, the reporter read the answer.)

Mr. Taylor: Calling for a conclusion. [575]

Q. (By Mr. Stevens): Now, during the time that Mrs. Cathey was in the bar, the Alibi Club from the 22nd to the 30th of January, did you ever examine the marks on her body?

A. I rubbed stuff on them different times and helped her around a little.

Q. Did you ever notice any finger marks on her body?

A. I wouldn't know finger marks from any other marks.

Q. Well, on the 30th of January, did you notice any finger marks on her body?

A. Same marks that was there all the time.

(Testimony of Leon D. Urban.)

Q. Did you notice her skin and the bruises on her skin on the 30th?

A. Oh, they were the same.

Q. Were they turning any different color?

A. Well, she always did any time you touched her she would turn a little brown anyway, not bad. I might have been imagining things, too, because I was kind of worried.

Q. Did you tell the coroner's jury, and Mr. Taylor, this is again in compliance with your request, from the record, that on, "the first time I noticed her turning, her skin, of course, she was around the bar, she always wore slacks and lots of times she would have a little beer or something, we would be sitting around there and she would show me the finger marks"? [576]

A. Well, she would always, wherever somebody grabbed ahold of her to dance it would leave marks on her. It would go away the next day or the day after.

Q. This is specifically on the 30th, Mr. Urban, did you tell them you did that on the 30th?

A. I never said anything about finger marks on the 30th.

Q. Now, yesterday evening just before the cross-examination was temporarily interrupted we had gone through the fact that before Mrs. Cathey's death you had told Mr. Goodfellow about the, the story about the woman, is that correct?

A. Yes.

(Testimony of Leon D. Urban.)

Q. And before Mrs. Cathey's death you had told Mr. DeWalt?

A. I didn't tell Mr. DeWalt anything.

Q. You never told Mr. Dewalt anything down at the Alibi Club?

A. All he asked what had happened and I said she had a fight awhile back. I called the doctor.

Q. You didn't tell him anything about a woman?

A. I never said anything that I remember. I told him there was no use to ask questions, the doctor had been in there, she had been in a fight a few days, the 22nd before. I don't remember if I told him the exact date or not.

Q. And then when Officer Byrom saw you right after Mrs. Cathey died, what story did you tell him? [577]

Mr. Taylor: That has already been gone into, your Honor. We object to it, repetitious.

The Court: He may answer.

Mr. Urban: I don't remember.

Q. (By Mr. Stevens): Did you tell him what you have told this jury here or what you told Mr. Goodfellow before she died?

A. I don't remember what I said.

Q. Well, then, when you went over to see Mr. Wirth and Mr. Goodfellow over in the police station after Mrs. Cathey died what story did you tell them?

Mr. Taylor: Already been gone into, your Honor. We object, repetitious.

The Court: The court is a little more liberal

(Testimony of Leon D. Urban.)

than usual because the cross-examination has been broken up twice. He may proceed.

Mr. Urban: I answered once.

Q. (By Mr. Stevens): Well, tell us again. That was last night.

A. At the police station?

Q. Over at the police station on the morning of the 31st, what story did you tell them?

Mr. Taylor: We are going to object, your Honor. This is absolutely repetitious. I don't think anything to be gained by it, not adding to, subtracting from the case. We [578] feel it is unduly prolonging this interrogation. If he testified to it let him roll it back into the record there, find out what he wants.

The Court: I believe repetition is frequently permitted in cross-examination. The Court will permit it.

Q. (By Mr. Stevens): Will you tell us that story, please, Mr. Urban?

A. Which is that?

Q. The one you told Mr. Wirth and Mr. Good-fellow at the police station on the morning of the 31st of January.

A. 31st of January?

Q. Yes.

A. That is when I went up and took her address up and got her address for her mother and give it to the police station and I took it and sent a wire to her mother.

Q. What did you tell Mr. Wirth and Mr. Good-fellow?

A. They started in asking me about it. I just

(Testimony of Leon D. Urban.)

told them that she told me a woman beat her up.

Q. You repeated the story about the woman then? A. Well, they asked me.

Q. Mrs. Cathey was already dead at that time, was she not? A. That's right.

Q. What was your reason for continuing that story after she died? [579]

A. I told Frank to come out and see me. I didn't feel like talking that night. I felt kind of bad about it. I thought a lot of her.

Q. But you repeated the same story, did you not?

A. I just told him what Mr. Goodfellow had asked me. I told Frank, I will see you, so I went home.

Q. They asked you for the description of this woman? A. I don't remember.

Q. They asked you if you knew where she lived?

A. No, not that I remember.

Q. They asked you if you knew her personally?

A. I told them I didn't know any woman.

Mr. Stevens: That's all, Mr. Urban. Thank you very much.

Mr. Taylor: Just a moment.

Redirect Examination

By Mr. Taylor:

Q. Mr. Urban, in response to questions by Mr. Stevens you said that the drawers, chest of drawers in her room had been changed a number of times?

A. Yes, sir.

(Testimony of Leon D. Urban.)

Q. And how would that happen?

A. Somebody looking for a certain chest of drawers. If I got a set in the room I go in and sell them, take them out, put something else in. [580]

Q. And as to those, how many chest of drawers was there in the room at the time that Miss Cathey went to the hospital? A. There was two.

Q. And how long had those chest of drawers been in there?

A. Well, one of them had only been in a few days. I could find out the exact date because it was sold through the public finance, and I bought it through the public, they sell stuff on the sale so I bought it there. I could check, see what date it was.

Q. And how about the other one?

A. Well, I bought it on a sale for Mrs. Cathey. She wanted it because it was small.

Q. And were those second hand desks, Mr. Urban? A. Yes.

Q. And was Miss Cathey bleeding considerable when she came home the morning, the afternoon of the 22nd? A. She wasn't bleeding.

Q. What? A. She wasn't bleeding.

Q. Did she bleed any when you removed the stitches from her lips?

A. No, a little under the lip. She had a little bit in her spit was all.

Q. Now you, Mr. Stevens has talked to you quite a bit about a woman, Mr. Urban, that you testified that Miss Cathey [581] asked you to state that she had been in a fight with a woman?

(Testimony of Leon D. Urban.)

A. That's right.

Q. So that then was an entirely mythical woman concocted by Miss Cathey?

A. That's right, as near as I know.

Q. Now, also, Mr. Urban, Mr. Stevens asked you on the afternoon of the 30th before Miss Cathey was taken to the hospital the evening of the 30th, he mentioned was Miss Cathey in any condition at that time to talk regarding her condition or anything else?

A. Yes, we had sausage and hamburger and we made it in hamburger and we both eat there.

Q. What time was that?

A. Oh, I would say around four o'clock in the afternoon.

Q. And then when was it that she had this seizure, what time of the afternoon or evening was that?

A. Well, it was in the evening, I would say around eight o'clock. I am not exactly sure of the time. That is when I first called and called to get the doctor and he got there about an hour later, an hour and a half later.

Q. And that seizure was such it alarmed you then, did it, Mr. Urban? A. Yes.

Q. And you called the doctor to get her to the hospital. So then through the entire nine days that she was home there [582] after she was beat on the 22nd you had a number of conversations about who had beat her, is that right?

A. I asked her different times. She said she

(Testimony of Leon D. Urban.)

didn't want to say a word. She would take care of her own troubles.

Q. She was adamant then that she was going to take care of her own revenge, if any, was going to be had, is that right? A. That's right.

Q. Did you ask to see Frank Wirth?

A. Yes, I did one day.

Q. Now, now, Mr. Urban, I don't know whether Mr. Stevens confused or whether you were confused, I would like to get this straightened out, did you talk to Mr. Goodfellow at the police station on the morning of the, Fairbanks police station early in the morning of the 31st, right after Miss Cathey's death?

A. Frank Wirth is the one I talked to.

Q. What?

A. Frank Wirth was there. He is the one I talked to.

Q. Frank Wirth, the city police then was he?

A. Yes, he was chief detective.

Q. And on that morning was Mr. Goodfellow, the territorial highway policeman, was he at the city police office?

A. He was standing there.

Q. He was standing there, and you had, you testified that you had a talk with him at the hospital, is that right? [583]

A. Yes, he come up there.

Q. And was that the time that you gave him the story that Miss Cathey had asked you to give?

A. Yes, before she died, passed away.

(Testimony of Leon D. Urban.)

Q. And after you, after she died then, after she died then you gave them the story as it actually was, is that right?

A. When I went to the police station to take her address I just told Frank what I had told Mr. Goodfellow and I told Frank to come out and see me.

Q. Did you have a talk with Mr. DeWalt, police officer, Fairbanks?

A. No, when we was putting her in the ambulance he walked up and he——

Q. Just a moment. O. K., go ahead.

A. We was putting her in the ambulance. I believe he just walked up and said, "What's wrong."

Q. Wait a minute, just a moment, a little louder, Mr. Urban, I can't hear you.

A. He walked up. He had his flashlight. He said, "What's wrong?" I just told him the doctor had left, give her a shot, she would, she had been in a fight. That's all I told him. I never told him no specific dates or anything that I remember at all.

Q. Where would that take place?

A. That was at the Alibi Club when the ambulance was [584] getting ready to bring her to the hospital the 30th it was.

Q. Now, after, from the time that Miss Cathey had the seizure, I believe it was a doctor called it a seizure at the Alibi Club, was she able to carry on a conversation?

A. Yes, sir.

Q. Did she talk to the doctor when he came?

(Testimony of Leon D. Urban.)

A. No, when he came she was pretty, well, when he come the 30th you mean?

Q. Sir? What day do you mean?

Q. That was on the 31st when he came and ordered her to the hospital?

A. It was the 30th.

Q. What? A. The 30th.

Q. The 30th, yeah.

A. No, she was pretty well out when he come.

Q. You know what I meant by seizure, the time she had that convulsion and kind of seemed to go into a coma? A. Yes.

Q. Was she ever conscious again after that to carry on a conversation with her?

A. No, at the hospital I was rubbing her forehead a little bit she opened her eyes. That is when we went and got the nurse then because she began to choke.

Q. Just keep your voice up, Mr. Urban. It is a little [585] difficult when we are competing with the Army Air Force here so we will have to keep our voices up so we can hear.

A. From the time we left or the doctor come out to the Alibi to the time she was in the hospital she didn't speak but up at the hospital I kind of rubbed her forehead and a lot of blood come out of her mouth before she started pumping on her throat, so I was rubbing her head, her forehead was kind of damp. She opened her eyes and she closed them. I went and got the nurse. She began to choke again.

(Testimony of Leon D. Urban.)

was half owner. She had to work one shift. What she done when she got off shift was her business.

Q. Do you know what that business was?

A. Well, I can't prove anything.

Q. I am asking you if you know what it was?

A. Well, just hearsay is all.

Q. From who?

A. I heard her mention it to, at the bar.

Q. Did you work last night, Mr. Urban? [588]

A. Yes, until a quarter till five this morning.

Q. Till five this morning. What were you doing?

A. Well, we had a sale last night, by the time you get the bills figured up on the sale, pay off.

Q. By sales what do you mean?

A. The auction sale.

Q. That held in your warehouse out near the Alibi Club? A. That's right.

Q. Then what did you do?

A. I tended bar then until just about ten minutes till five, the time I got the register checked and got the lights out.

Q. Have any trouble out there last night?

A. The bartender got drunk.

Q. What?

A. The bartender was drunk when I got off from court yesterday.

Q. Have a fire?

A. Yeah, he laid down in my bed, the Alibi Club, in the room, burned a whole in the mattress, burned all the blankets up, the sheets.

Mr. Taylor: That's all.

(Testimony of Leon D. Urban.)

Recross-Examination

By Mr. Stevens:

Q. Just one line of inquiry here, Mr. Urban. Did you [589] state that Mrs. Cathey could talk to you after this pop on the back on the 30th of January? A. No.

Q. Did she carry on a conversation with you after that? A. No.

Q. Well, after that happened, this loud pop that you have told us about, what did she do?

A. She just kind of like she passed out and that is when I called the doctor. I never waited and I called, called home, told them it was very important, I had to have the doctor and his wife got ahold of the doctor and he come.

Q. She didn't tell you her fingers were getting numb?

A. Well, I don't remember just how she did say, when I was rubbing her back she said, rub my hand a little bit, my fingers is kind of numb, or sore on the ends. I don't remember just how she did say.

Q. Was that before or after the snap of the back?

A. Before. I was getting ready to rub her. I rubbed her arms and legs.

Q. She didn't say anything to you at all after that snap of the back, is that right? A. No.

Mr. Stevens: Thank you, Mr. Urban.

Mr. Taylor: That's all, Mr. Urban.

(Witness excused.) [590]

Mr. Taylor: Like to call Mr. McKenna.

MICKEY McKENNA

a witness called in behalf of the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Taylor:

Q. State your name, please?

A. Mickey McKenna.

Q. And where do you reside, Mr. McKenna?

A. Fairbanks Hotel.

Q. And what is your occupation or business, if any?

A. Bartender, sir.

Q. Where you tend bar?

A. Players Club.

Q. How long have you tended bar there?

A. Two years this time.

Q. Have you been tending bar the last two days?

A. Not the last two days.

Q. Where have you been?

A. I was up the river.

Q. Fishing? A. Well, tried it.

Q. I believe you just returned from your fishing trip, did you?

A. I come in about ten minutes to ten. [591]

Q. Were you tending bar on the 22nd day of January, 1955?

A. Yes, I can't remember that.

Q. What? A. I don't remember that.

Q. Are you acquainted with Mr. Urban, the defendant?

A. Yes, sir.

(Testimony of Mickey McKenna.)

Q. Are you acquainted with a Miss Cathey who is now deceased? A. Yes.

Q. Myrtle Cathey. Do you know a Mr. Haretos?

A. George? Yes.

Q. And do you know a bartender by the name of Murray? A. Yes.

Q. Now, calling your attention to the early morning hours of the 22nd day of January, 1952, ask you to state, did you see Mr. Urban and Miss Cathey in the Players Club?

A. Yes, the morning, yeah, they were in, what day it was I don't know, but they were in there one morning.

Q. And about that time was it? About that time of the morning?

A. Well, it could have been. The date I don't remember.

Q. And do you remember the sequence in which you saw these people?

A. Well, yes, the last time they were in there bought a drink for the house. [592]

Q. Who bought the drink for the house?

A. Curley.

Q. And did they both, did they both arrive there at the same time?

A. Gee, that I don't remember. Both sitting there when they ordered the drink though.

Q. And do you know how many drinks you served, Mr. McKenna?

A. Around about seven or eight.

(Testimony of Mickey McKenna.)

Q. You remember what the bill was?

A. Seven or eight, eight dollars I think it was. He did it twice before they left.

Q. So spent sixteen dollars there, is that right?

A. Yes, sir.

Q. And did you see Mr. Urban and Miss Cathey leave the place?

A. Seen them going to the door. I says "good night" to them.

Q. Was there any unusual episode took place as they were going out or prior to going out?

A. No, didn't see it.

Q. And was you in a position where you had a clear view of the Players Club from the bar toward the door?

A. I am in the best position in the world.

Q. And I am going to ask you a direct question, did you [593] see Miss Cathey fall on the floor?

A. No, sir, I did not.

Q. Did you see Mr. Urban use any force or violence toward Miss Cathey?

A. No, sir, I did not. Not in the club.

Q. And when you said, where were they when you said good night to them?

A. Heading right to the door and I always say good night to anybody that will timber.

Q. And was you in a position where you could see them go out the door?

A. They are right at the door. The door just swings, I am looking right over the bar when they says good night.

(Testimony of Mickey McKenna.)

Q. Was there anything unusual take place when they went out the door?

A. I didn't notice anything, no, sir.

Q. Do you know George Haretos?

A. Yes, sir.

Q. Do you remember what George Haretos' condition was that night in relation to sobriety?

A. No. Everybody was drinking, no different than usual or any other night.

Q. At any time did you see George Haretos go toward the door to intercept Mr. Urban and Miss Cathey?

A. No, sir, I don't think so. Can't remember. [594]

Q. And if he had a run toward the door would you have seen him?

A. I imagine I would have. I was in, right behind the bar where I would seen anybody running or heard anything.

Q. Now, Mr. McKenna, did you hear any arguments or quarrel between Mr. Urban and Miss Cathey that night?

A. No, because they were sitting right in front of my service set-up. I would have heard that.

Q. You would have heard it?

A. Sure, right in front of what they call the service set-up.

Q. Now, do you remember who was sitting with them?

A. Oh, about seven or eight people. Jimmy was on one corner, George, him and her, a GI, I think

(Testimony of Mickey McKenna.)

on this side. I can't remember. That was the last timber I had. There was about six or seven of them at the bar anyway.

Q. And——

A. One guy standing down by the piano.

Q. That bar I believe is in the form of a "U," is it not? A. Yeah.

Q. At which side of that "U" were they sitting on?

A. I am always on the left-hand side of the bar. That is where I work out of. It would be the right-hand side going in. [595]

Q. Right-hand side going in? A. Yeah.

Q. And the end of that leg of the bar the piano player sits? A. Yah, back bar piano.

Q. Now, how long have you known Miss Cathey?

A. Oh, I never really knew her personally. She just come in and drank there. That was all.

Q. How often would she come to the Players Club?

A. Gosh, I can't remember that but I remember seeing her often anyway.

Q. And what would you say as to her drinking habits? A. She was a good one.

Q. Good drinker, and what would you say as to her disposition when she is taking on a load of drinks?

A. Oh, I can't say anything about that. She liked to have a lot of fun.

Q. Well, in what particular method would she pursue to have that?

(Testimony of Mickey McKenna.)

A. Oh, just singing and gay, keep going. Course she never did stay there very long at any time that she ever come in.

Q. Did she ever dance? A. Beg pardon?

Q. Ever dance?

A. Oh, yes, she danced out there. [596]

Q. What kind of dances would she put on?

A. Oh, get out there and dance by herself.

Q. She ever fall down in one of those dances, you ever see her fall down?

A. Yeah, one time right in the bandstand. That could happen to anybody. I did that, too?

Q. Was that prior to this night?

A. Oh, yeah, that was back quite awhile before.

Q. Quite a while before? A. Yeah.

Q. Did you ever hear her have quarrels with anybody any place?

A. No. That is the only place I ever seen her was just in my place.

Q. She conducted herself all right when she came there to the Players Club?

A. Oh, well, she never stayed there long, you know, she would have just one or two and then move out.

Q. Now, that early morning of the 22nd of January, did you hear any discussion between Curly and Pat about going home?

A. Well, yeah, he asked her to go on home and she said, well, buy another drink, so that is when he bought the other drink. That is when he timbered the next time.

(Testimony of Mickey McKenna.)

Q. Then they both got off the stool?

A. They went, I said good night, kids, like I say to [597] everybody.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Stevens:

Q. Now, Mr. McKenna, do you drink when you are on duty? A. Yes, sir.

Q. As a matter of fact, you keep right up with the crowd, don't you? A. Well, I drink.

Q. Well, do you keep up with the crowd that is in there?

A. It's pretty hard to keep up with about three of four hundred dollars worth of drinking a night. You can't do that.

Q. You know George Haretos?

A. Yes, sir.

Q. You know Jim Murray? A. Yes, sir.

Q. You see Jim in there that night?

A. Yes, sir.

Q. Was he down by the piano anywhere that you remember?

A. Could have been, Buz was playing. They move around all the time.

Q. Do you know whether George was down there by the piano?

A. Sitting down by the piano?

Q. Was he sitting at the bar with Pat at all, any time that night? [598]

(Testimony of Mickey McKenna.)

A. No, I don't think so.

Q. Did he buy her a drink that night?

A. Well, he might have because he always does buy drinks when he comes in.

Q. If Mr. Haretos said that he sat at the bar and bought Pat Cathey a drink that night, would you say he was wrong?

A. No, I couldn't say he was wrong. I don't remember.

Q. And if Mr. Murray and Mr. Haretos said they were down by the piano would you say that was wrong, that night? A. No.

Q. And do you know Sherry Johnson, Sherry Yendes? A. No, sir.

Q. Do you know a girl named Sherry?

A. No, I don't.

Q. Was there a girl came in with Curley that night, did you see a girl come in with Curley that night? A. No.

Q. Do you know a little girl, a little woman really, not a girl, a little woman that is a little hard of hearing named Sherry? A. No.

Q. Do you remember seeing Miss Cathey fall?

A. I didn't see Miss Cathey fall.

Q. Well, could you say that she did not fall while she was leaving the place that night? [599]

A. I couldn't say that. They were walking out the door when I seen them.

Q. Then you went about your business?

A. Yes.

(Testimony of Mickey McKenna.)

Q. You didn't pay any particular attention to them leaving, you said good night and went on about your business?

A. They were at the door when I said good night.

Q. They were already going out the door?

A. They were going out the door this way, somebody called me and I went to pouring my drinks.

Q. You didn't see her fall at all?

A. No, sir.

Q. Did you see George Haretos start toward the door to help Pat Cathey that night?

A. No, sir, I did not.

Q. Do you know whether he did start toward the door to help Pat Cathey?

A. No, sir.

Q. You didn't see him?

A. No, sir.

Q. Or don't you remember?

A. I don't remember.

Q. Would you say that he didn't?

A. I couldn't say either way.

Q. Well, now, if there was some small family quarrel [600] there in your bar and someone started to intervene, would you tell them to stay out of it, it wasn't any of his business?

A. Surely, that is why I'm there.

Mr. Stevens: Your witness, Mr. Taylor.

(Testimony of Mickey McKenna.)

Redirect Examination

By Mr. Taylor:

Q. Then if Haretos had of rushed toward the door, you would have seen him?

A. Anything like that I am the one most likely to see that.

Q. If anybody fell off the bar stool, Mr. McKenna, would you see that?

A. Yes, I see them all the time.

Q. That would be the time you would quit selling them anymore liquor?

A. They don't get any more.

Q. And if Miss Cathey had fell off the stool that night, you would have noticed it?

A. I would heard it or seen it. I would have looked anyway. I would have remembered it.

Q. Mr. Stevens asked you about a girl named Yendes, Sherry, Sherry, might go a little more in that, it is a girl that is quite hard of hearing. She is practically deaf?

A. No, I don't.

Q. You don't know her? [601]

A. No.

Mr. Taylor: That's all.

Recross Examination

By Mr. Stevens:

Q. Now, had Miss Cathey come to the point where you wouldn't sell her any more liquor that night?

A. No, it wasn't that way. Curley bought a drink there and he says, well, let's go and she says, "well,

(Testimony of Mickey McKenna.)

buy another drink'' and that is just what he did. I just remember the drink. George could have bought a drink for the four of them. I don't remember that, but I do remember the two timbers in a row.

Q. Did you see George with Pat Cathey before Curley came in the bar? A. No.

Q. Well, would you say that Mrs. Cathey was fairly well intoxicated? Did you hear my question?

A. No, sir.

Q. Would you tell us just how intoxicated you thought Mrs. Cathey was that night?

A. She was tight all right.

Q. She was pretty well gone then?

A. Yeah.

Q. Had you ever seen her stagger out of the place?

A. I have seen her drinking before, never seen her stagger. [602]

Q. How long have you known Mr. Haretos?

A. Oh, off and on since I got out of the service here in '45, I would say.

Mr. Taylor: How long? I didn't get that.

Mr. McKenna: Since I got out of the service, since I have been tending bar around town, since 1945 I would say.

Q. (By Mr. Stevens): And how long have you known Mr. Murray?

A. I think just about since he come to town. I don't know how many years, about four or five years, I don't know.

(Testimony of Mickey McKenna.)

Q. Do you know whether they have had any difficulties with Mr. Urban? A. No.

Q. And if Mr. Haretos would say that he did go toward the door, as a matter of fact went outside of the club to follow Pat Cathey and Mr. Urban that night to see what the dispute was, would you say he is wrong?

A. I don't know about that. I will say a lot of people go out the door. I never pay any attention to that, just single people going out.

Q. You would say you didn't see him if he did, is that right? A. Surely.

Q. And if Mr. Murray said he saw Pat Cathey fall would you say he was wrong? [603]

A. I can't say. I didn't see it.

Mr. Stevens: Thank you very much.

Redirect Examination

By Mr. Taylor:

Q. Is Mr. Haretos quite a heavy drinker, Mr. McKenna? A. He drinks, sir.

Q. What? A. He drinks, sir.

Q. Now at four, between four and four-thirty in the morning he might be pretty well loaded, wouldn't he?

A. Well, the drinking itself is bound to catch up with you.

Q. Well, isn't at a fact, Mr. McKenna, he is considered a drunkard? A. No, sir.

Q. What? A. No.

Q. Considered a heavy drinker then?

(Testimony of Mickey McKenna.)

A. Just a heavy drinker.

Q. What?

A. Just a drinker. I don't know what you would call a heavy drinker.

Q. Steady drinker?

A. Just a drinker. Just a guy that likes to drink.

Mr. Taylor: That's all, Mr. McKenna. Thanks very much. [604]

Mr. Stevens: Thank you very much, Mr. McKenna.

(Witness excused.)

Mr. Taylor: Call Mr. Sundborg. If the Court please, I just recollect I have a subpoena out for Mr. Sundborg and I requested him to be here at two o'clock instead of this morning. Could we take the recess till two.

The Court: You don't have another witness to go ahead with now?

Mr. Taylor: Not right at this time, your Honor. We have one other witness we have a subpoena for but he, I don't believe, has been served yet.

The Court: Members of the jury, once more it is my duty to admonish you that it is your duty not to discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject of the trial; do not form or express any opinion thereon until the case is finally submitted to you. Do we have anything at one-thirty?

The Clerk: No, we do not, your Honor.

The Court: Court will adjourn until two o'clock.

The Clerk: Court is adjourned until two o'clock this afternoon.

(Thereupon, at 11:35 a.m., a recess was taken until 2:00 p.m.) [605]

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Let the record show the presence of the defendant and his counsel; the government attorneys. The parties wish the jury polled?

Mr. Taylor: Stipulate that the jury are all present, your Honor.

The Court: Does the government so stipulate.

Mr. Stevens: The government so stipulates, yes, your Honor.

The Court: Very well.

Mr. Taylor: If the Court please, we had a couple witnesses subpoenaed to appear this afternoon. We find out one of them is in Anchorage and the other was in McKinley Park and we would like to move this Court to take one hour's recess. We have others that could testify to the same set of facts and I think we could have them here by three o'clock. We would ask postponement until three o'clock.

Mr. Stevens: We have no objection. We likewise find a witness is in Anchorage and in view of the fact that not only is one in Anchorage but the other is on a fishing trip in Big Delta, two officers, one formerly before the Court, Mr. Trafton, and

in view of the fact that we cannot obtain their testimony in time before the trial ends, we would ask the Court [606] to strike from the record all reference to any stains or any type of spots in the room that Myrtle Cathey was in and instruct the jury to disregard them. We cannot get Mr. Trafton back here in time.

The Court: Very well. Members of the jury, at this time the Court instructs you to disregard any testimony that has been offered in this case relating to any blood stains that might have been in the room in the Alibi Club. Does that cover the situation, Mr. Stevens?

Mr. Stevens: Thank you, your Honor, yes, and I'm sorry.

The Court: And this is an important case and the Court is going to grant the request of the defendant and once more I admonish you folks not to discuss the subject of this trial with anyone; not to permit anyone to discuss it with you; and not to listen to any conversation concerning the subject of this trial; and do not form or express any opinion thereon until the case is finally submitted to you. Will you, please, return to your positions at three o'clock?

The Clerk: Court is at recess until three o'clock.

(Thereupon, at 2:05 p.m., the Court took a recess until 3:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened. [607]

The Court: The parties wish to have the jury polled?

Mr. Taylor: No, we will stipulate, your Honor, that all the members of the jury are present.

Mr. Stevens: We will so stipulate, your Honor.

The Court: Very well. You may proceed.

Mr. Taylor: I would like to call Doctor Storrs, your Honor.

The Court: Very well.

DR. HENRY STORRS

a witness called in behalf of the defendant, was duly sworn, and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. Henry Storrs.

Q. And where do you reside, Mr. Storrs?

A. I live in College.

Q. And what is your profession or business?

A. I am a surgeon.

Q. And are you regularly licensed doctor and surgeon under the Territory of Alaska, laws of the Territory of Alaska? A. That's right.

Q. What degrees do you have, Doctor, in medicine or surgery?

A. I have a M.D. degree. [608]

Q. And what school did you attend to acquire that?

A. University of Pennsylvania, School of Medicine.

(Testimony of Dr. Henry Storrs.)

Q. And did you take any post-graduate or specialized work afterwards?

A. Yes, sir, I took six years of surgical training.

Q. And have you then been, how long have you been in actual practice, Doctor?

A. Almost three years.

Q. And then you had six years of special training, and how much or regular training?

A. Five years.

Q. Five. Eleven years, was that, all together?

A. Yes, sir.

Q. Now, Doctor, I want to ask you a hypothetical question based upon certain evidence. Doctor, assuming that a woman of a hundred sixty-eight pounds weight who was under the influence of liquor and was sitting in the rear seat of an automobile and who wore her hair long and that a man seized her by the hair with both hands, dragged her out of the cab and then ten feet across the ground to the door of a building and then into the building, and that her entire weight was dragged by her hair. Now, assuming those facts, Doctor, do you have an opinion based upon your medical studies and upon your professional practice as to the, as to the result to the head, scalp or hair of the woman? Just say yes or no, have you got an opinion? [609]

A. Yes.

Q. What is that opinion, Doctor?

Mr. Stevens: I will object until Mr. Taylor further qualifies the Doctor to show his experience

(Testimony of Dr. Henry Storrs.)

in regard to injuries to the head, particularly injuries from hair pulling.

Q. (By Mr. Taylor): Doctor based upon your experience as to loss of scalp in cases that you have treated and injuries from pulling of hair, can you base an opinion upon these assumed state of facts?

A. There are some dozen cases that have been reported in medical literature with which I am familiar.

Q. And then based upon that and your studies and you then could give an opinion in this case, Doctor?

A. Yes.

Q. What would be that opinion?

Mr. Stevens: I object further until we know the authorities and upon what the Doctor bases his testimony.

Mr. Taylor: Your Honor, I don't believe that is necessary. I believe the Doctor can give his, show his studies and course of the professional work and he can answer and then if the, Mr. Stevens wants——

The Court: He may answer. Of course, he is subject to cross-examination.

Dr. Storrs: As far as pulling out of the automobile, [610] it would be only minor damage. There is a downward trend, it would be an upsetting of the equilibrium, a small bruise perhaps, nothing more. As far as dragging the total weight without any assistance by the hair with sufficient hair so that the hair didn't come out in the hands as under the assumed question, there would be a tendency to pull the scalp away from the bone, from the

(Testimony of Dr. Henry Storrs.)

skull. In other words, the skin and hair would stay together and the tendency would be to pull the scalp away from the bone and if it didn't come all the way loose there would be a tendency to bleed under the scalp and there would be evidence of separation of the scalp from the bone.

Q. Doctor, taking the weight of the woman into consideration, would you state your opinion as to whether or not the scalp could be torn loose from the head?

A. With a horizontal drag it might not be pulled loose with somebody pulling gradually and slowly. If they was pulled upwards as has been shown in numerous cases, the scalp will come loose entirely and will be scalped. This has happened in numerous cases where a woman working around an overhead belt, machinery where the hair is caught and pulled the entire scalp is pulled loose.

Q. Now, assuming that the scalp was torn loose from the skull, Doctor, what would be your opinion as to profuse bleeding between the skull and the scalp?

Mr. Stevens: I object to that. That is a hypothetical [611] question based upon facts not in evidence.

The Court: He may answer.

Dr. Storrs: There would be profuse bleeding. There is a lot of blood vessels between the scalp and the skull and there would be a lot of bleeding.

Q. (By Mr. Taylor): I assume then from your answer, Doctor, that it would be, there would be

(Testimony of Dr. Henry Storrs.)

either a scalping or there would be a, the scalp would be torn loose from the skull, is that right?

A. Yes.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Stevens:

Q. Doctor, then would you tell us what authorities have you referred to for this information?

A. I can't quote you the exact source of literature because it isn't fresh in my mind.

Q. How long ago did you review them, Doctor?

A. The last one would be about two years ago I would say.

Q. Have you ever had any experience with a situation where the hair has been pulled in a violent type of crime?

A. I have had experience where it has been removed surgically.

Q. No, the question though, Doctor, have you had any experience with hair that has been pulled in connection with a [612] violent type of crime?

A. Not with crime, no, sir.

Q. Now, this bleeding you have spoken about under the scalp, would any of that be located in the temporalis area?

A. What do you refer to as the temporalis area?

Q. Well, I am not a medical man, Doctor. I have been told that there are temporalis muscles that come across and down, is that correct? Would any

(Testimony of Dr. Henry Storrs.)

of that bleeding be present in that area if the pulling was on the hair?

A. If it was in that direction. There is a lot of variables as to the extent and exact position where the bleeding would be, whether it would front or back or all over.

Q. If the woman were pulled face down, it would be on the forward part of her skull, would it not?

A. It would depend upon——

Mr. Taylor: Just a moment, Doctor. Let's let this plane go by.

Dr. Storrs: It would depend upon which hairs were pulled. In other words, whether you had the longer hairs, the pull face down or face up would make no difference depending upon whether the back of the hair or front of the hair was more on the pull.

Q. Well, if a woman was grabbed by the front of the hair and pulled, would the bleeding be under the scalp near this temporalis muscles that I spoke of? [613]

A. If the front of the hair was pulled it would be under the front of the hair.

Q. Now, when were you requested to come as expert witness in this case?

A. Mr. Taylor telephoned me about a quarter of three.

Q. As a result of any previous conflict between your office, between my office and yours, do you have any bias toward the prosecution?

A. Say that again.

(Testimony of Dr. Henry Storrs.)

Q. As a result of any previous conflict between my office and you personally, do you have any bias toward the prosecution of this case?

A. I am not aware of any conflict with your office.

Q. Do you recall a time when you testified in connection with an inquest in regard to the death of two persons in the Graehl area, Doctor?

A. I testified at several inquests. I don't recall which.

Q. These two were two young gentlemen that were found in a house over there?

A. I may have testified. I don't remember your presence or absence.

Q. They had by one other Doctor's testimony been suffering from acute carbon monoxide poisoning?

A. Yeah, I remember it. [614]

Q. And your opinion differed greatly from that, did it not, Doctor?

A. I believe my opinion did differ from the verdict of the coroner's jury.

Q. Well, it differed greatly from the other Doctor's opinion, did it not?

Mr. Taylor: If the Court please, I don't believe that this is proper questioning. A difference with another Doctor, your Honor, I don't believe would be any grounds for bias or prejudice against the District Attorney's office.

The Court: Are you objecting?

Mr. Taylor: I am objecting to the question.

The Court: Sustained.

(Testimony of Dr. Henry Storrs.)

Q. (By Mr. Stevens): Well, as a result of the coroner's inquest, were you not, that coroner's inquest, were you not quite upset by the District Attorney's office?

Mr. Taylor: If the Court please, I am going to object to that as immaterial, incompetent and irrelevant.

The Court: He is attempting to prove bias. He may proceed in that line.

Dr. Storrs: I was unaware of the District Attorney's office had anything to do with the decision in that case.

Q. (By Mr. Stevens): But that is not the question. Weren't you upset with [615] my office?

Mr. Taylor: We are going to object to the word upset, your Honor. I don't believe that has a legal meaning.

The Court: Well, if the Doctor understands it, he may answer.

Dr. Storrs: Your Honor, I fail to see any connection with the District Attorney and the inquest. I always understood they were separate, there was no connection between the two. Any bias from a coroner's inquest based to the District Attorney's office?

The Court: Well, Mr. Stevens has asked a question. If you can answer it, will you do so?

Dr. Storrs: Will you state your question again?

Q. (By Mr. Stevens): Didn't Mr. Yeager ask you a series of questions when you appeared before that inquest jury?

(Testimony of Dr. Henry Storrs.)

A. I couldn't even tell you who was asking the questions then.

Q. It was someone from the District Attorney's office, was there not?

A. I won't deny the fact. I don't recall.

Q. And was it not a fact that you got quite upset as a result of the resulting verdict of the coroner's jury there?

A. I don't remember getting upset at all.

Mr. Stevens: Your witness, Mr. Taylor. [616]

Redirect Examianition

By Mr. Taylor:

Q. I take it then you have no bias or prejudice in this present case then at all, Doctor?

A. Yes, sir.

Q. You have? A. No.

Mr. Taylor: That's all, Doctor.

Mr. Stevens: One more question, Doctor, if you don't mind.

Recross-Examination

By Mr. Stevens:

Q. Would the effect of being dragged across snow have anything to do with it as this friction that results in the strain on the scalp?

Mr. Taylor: We are going to object, your Honor. There is no evidence. The testimony in the case is she was dragged across the ground.

The Court: I don't think it is clear in the evidence what condition the ground was in at that

(Testimony of Dr. Henry Storrs.)

time. We know it was cold. We don't know the condition of the ground.

Mr. Stevens: I will withdraw the question. Thank you, Doctor.

(Witness excused.)

Mr. Miller: Like to call Mr. Anders, please. [617]

BILL ANDERS

a witness called in behalf of the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Miller:

Q. Will you state your name to the Court, please?

A. I am Bill Anders.

Q. Will you speak up a little louder. I can hardly hear you?

A. Bill Anders, A-n-d-e-r-s, Anders.

Q. Where do you live?

A. 714-17th Street.

Q. What do you do for an occupation?

A. I am a bartender.

Q. Where do you work?

A. Club Birdland.

Q. How long have you worked at the Club Birdland?
A. Since August the 9th, of '54.

Q. Were you working at the Club Birdland on the 1st day of January, 1955?

A. Yes, I was, because I was the oldest one there.

(Testimony of Bill Anders.)

Q. Were you working at the Club Birdland on the 22nd day of January, 1955?

A. Yes, I was.

Q. Did you work at that place your regular shift between that period of time? [618]

A. Yes, approximately from six o'clock until six in the morning, six in the afternoon until six in the morning.

Q. You worked a twelve hour shift then. Do you know Myrtle Cathey, Myrtle Patricia Cathey, I believe she was known as Pat?

A. I met her in the first part of the year. What day I don't, I don't know. She came to the Birdland and she introduced herself to me and told me she was part owner of the Club Alibi and that is how I met her.

Q. Do you recall anything special about her at the time that you met her?

A. Well, nothing too special, no more than she was, she mentioned something about she hoped this year would be a better year for her than '54, and I asked her had she been having troubles in '54 and she said, well, yes, she hadn't been here long. She had been, she had came from the states to investigate a, her sister's death. She said her sister was supposed to took some sleeping pills in Anchorage and she was still investigating and she never could see where she would ever kill herself. She said she was too fine a person to kill herself and that is how I remember ever talking to her the first time. That is when she introduced herself to me.

(Testimony of Bill Anders.)

Q. Was she alone?

A. No, she, a cab driver brought her there.

Q. Do you know that cab driver? [619]

A. Well, at that time I didn't, until a good while after. Then I didn't know him.

Q. When did you meet him?

A. Well, I didn't meet him the night that he brought her there because he was just talking to her, and I wasn't introduced to him and I couldn't remember the guy after then too well, so I remember the night that she asked Roscoe Holland, he came out that morning to play a few numbers. He usually come out to see me. He wasn't working there but he come out there, so she asked him, she knew Roscoe and she asked him to play some particular song for her, and he did and she gave him a dollar and she gave him another dollar. She bought us all a drink and then this cab driver told her that he was ready to go and she said she would like to hear Roscoe play, she would like to stick around so he left and about thirty minutes he came back.

Q. Did he approach her again when he came back?

A. Yes, he told her that he came back after her.

Q. And did he, did they stay awhile or what happened at that time?

A. Well, they didn't stay too long because I can't, I don't know exactly what was said because I am not allowed to listen to the conversation, but anyway, he told, he came back after her. She told him she still wanted to stay there because Roscoe was still playing some numbers for her. She [620]

(Testimony of Bill Anders.)

then tells him he was paid off, to go get on. He says, "No, I'm not going nowhere. You are not talking to somebody else. You are talking to me," and then, well, she still was pretty well on her way, she was drinking and he pulled her off the stool and he pushed her to the door and they went on. Then a few days later after that happened the Territorial Policeman came there and asked me did she ever come out there. I told him yes, because I knew her and he says, "Well, do you know who brought her out here?" I say the man I wouldn't say because I am not sure who he was and he said, "Do you know what he looks like?" I say I didn't pay that much attention. So he came back again and he asked me had I ever seen that cab driver again. I told him that I couldn't remember him.

Q. Do you know who the highway patrolman was? A. Yes, I do.

Q. Who was it? A. Office Dankworth.

Q. Officer Dankworth? A. Yes.

Q. All right, go ahead.

A. And then he, he, after I told him the next time that I didn't know who he were he said, "Well, if you ever do find out who he were in the near future" said, "let me know because we are investigating a murder," so I told him if I could remember I would let him know but I couldn't remember the man. [621] I couldn't point him out so I never did remember him anymore until he came in, I would say two months later which he was, I

(Testimony of Bill Anders.)

wouldn't exactly say it was two months later, but anyway he asked me did I——

Q. How long ago from today has it been since he came in?

A. I would say about, I hate to say because I am not sure. Maybe——

Q. Can you give us an approximate time?

A. It was better than a month ago.

Q. It wasn't more than a month ago?

A. No. I don't think it was more than a month ago.

Q. During the month of, the latter part of April or up until today of May?

A. Say that again?

Q. I say, it was in the latter part of April, do you think? This is the 24th day of May now. Was it the latter part of April, the first part of May?

A. Must have been the latter part of April.

Q. And you say he came in, where did he come to?

A. He came in the Birdland again.

Q. And at that time what did he say to you?

A. Well, see, between the times of that, well, he had been, come in and out of there and, but as I say I see him like I see a lot of cab drivers, don't remember them so we have, we rolled the dice once or twice for some drinks over [622] the bar and he asked, he recalled my attention back to that time and I told him I just didn't remember about that and he said, well, Roscoe was playing the piano that night, and he said, "Did anybody ever ask you who was out here." I told him yes, so he said, well if,

(Testimony of Bill Anders.)

“Did you tell him?” I said no, because I didn’t know your name to tell them, because I haven’t known the man’s name, but I seen him, so he said, “In the event anybody ask you was I here, I wasn’t here that night.” I said, “Well, I don’t have nothing to do with that at all and I don’t want to get mixed up in that outfit because I know such a little about it.” I know nothing about it. That is what I tell him, so since then I have seen him numbers of times.

Q. Who was that person?

A. Well, his last name I don’t know, But I always called him Marvin. That is what he told me his name were.

Q. Do you know what cab he drives?

A. That I don’t know. I just know he is a cab driver and I also know he worked for Vic Hart because I have called him to carry me places.

Q. Would you know his last name if you heard it?

A. I wouldn’t be sure. I wouldn’t, I wouldn’t be too sure.

Q. Marvin Jennings?

A. His name reminded me of some, what made me remember [623] him, his name reminded me of some way back history, gangster, you know like Jesse James, Al Jennings, that is what his name, Al Jennings, that is who I thought of when he——

Q. Was his name Jennings?

A. That is what I think he said his name was. I’m not sure, but I know I remembered that I saw a picture and I remembered about a man named

(Testimony of Bill Anders.)

Al Jennings and I never heard that name before other than that.

Q. His last name was Jennings then, you think?

A. I think that is what he said his name were because I remember from that.

Q. You say that he asked you not to state that he had been cut out there with her that night?

A. Yeah, he told me he said he was on that case and he didn't want to let them know that he had been around out there that time or no other time, so I told him I hadn't told those people because they hadn't been back to see me no more because they came about five times to get me to identify the man and I told him I couldn't, which at that time I couldn't because apparently that is the first time I seen the man in my life and the other times he came in I wouldn't have known him from nobody else and if he hadn't reminded me of it, I never would have knew the man.

Mr. Miller: You may take the witness. [624]

Cross-Examination

By Mr. Stevens:

Q. Weren't you in this Court room the other day, Mr. Anders?

A. I was in here a few minutes when Mr. Taylor I think told you and the Judge that he had some law and you went over there. I didn't stay in too long.

Q. Now, let me refresh your recollection a little bit. Weren't you with Mr. Gines?

A. Yes, I was.

(Testimony of Bill Anders.)

Q. And Mr. Merk?

A. No, I wasn't with Mr. Merk.

Q. Wasn't Mr. Merk in the court room here when you were here?

A. Yes, he was. He had been here before I came here.

Q. He is a partner down at the Birdland, isn't he?

A. Very true.

Q. And weren't you here when Mr. Jennings was on the stand as a matter of fact?

A. No, I wasn't. No, no, no, I wasn't.

Q. What day were you here?

A. That I can't say because I am afraid I would make a mistake, but I do know that I wasn't here when he was on the stand. It had to be afterward.

Q. You knew he had been a witness in here, didn't you? [625]

A. Well, I had heard that he had been a witness. As far as knowing it, I didn't know because as I told you, I wasn't here.

Q. When was this he came out to tell you this story that you should forget about his being in your place with Miss Cathey?

A. Well, now, I just, well, I will tell you because he wouldn't ask me. That date I can't remember.

Q. Was it a week ago?

A. No, it was more than a week ago.

Q. Was it more than a month ago?

A. It was somewhere in the neighborhood of that.

(Testimony of Bill Anders.)

Q. Was it after the 25th of February?

A. Well, see, that would be more than a month ago. Yes, it had to be after then.

Q. It was after that?

A. I guess it was, because——

Q. And Mr. Jennings came in and told you that you should forget about that, that he had been in there?

A. Yes, he told me that, sure, he did. I would tell him he told me that. I told him those officers had never been back to question me any more and I hadn't seen them.

Q. This was quite awhile after the officers had been in to see you?

A. Oh, yes, a long time because they came in shortly [626] after that incident happened.

Q. And you say that Mrs. Cathey told this cabby to go away, that he had already been paid off?

A. That's right, she told him the second time he came back, she said, "You have already been paid off and I want to stay here because Roscoe is playing me some numbers and I like to hear it, and I like it here and I want to stay."

Q. Did you talk to Mr. Merk about this trial?

A. Oh, no more than he mentioned that it was going on.

Q. He has been here just about every day, hasn't he?

A. I don't know. See, I work nights and sleep days.

(Testimony of Bill Anders.)

Q. You haven't seen him while this trial was on?

A. I saw him here the other day but he was not with me. He was in here when I came in here.

Q. Who came after you to tell you you were going to testify here today?

A. Well, a cab came and knocked on my door. I was asleep.

Q. Did Mr. Urban come after you?

A. Mr. Urban?

Q. Mr. Urban:

A. No, by all means not, no.

Q. When——

A. I could tell you what company the cab driver told me what knocked on my door and told me I was wanted in court [627] because I had no intentions of being up here no kind of way, because I was asleep because I didn't get to bed until nine-thirty, ten o'clock this morning.

Q. When you were up here the other day did you tell Mr. Urban about this time Mr. Jennings was out here to see you?

A. No, I didn't talk to him at all.

Q. When did you tell him about this?

A. Tell who about it?

Q. Tell Mr. Urban or Mr. Taylor or Mr. Miller about this time when Miss Cathey was out there with Jennings?

A. Well, see, Mr. Taylor has asked me the same as a lot of other people did the man ever come out there.

(Testimony of Bill Anders.)

Q. When did he ask you that?

A. He asked me, let's see, it was about a week ago. Maybe it was, I think it was in the Co-op Drug Store. I was going out and he was coming in and he asked me did I remember. I said, yes.

Q. Well, when you were called to come in here, when were you called to come in here today, Mr. Anders?

A. Just about an hour ago. The cab driver woke me up.

Mr. Stevens: Your witness, Mr. Miller.

Redirect Examination

By Mr. Miller:

Q. Was that Mr. Taylor or myself that asked you if she had ever been in your place? [628]

A. I was under the impression Mr. Taylor because I was leaving out of the Co-op and you fellows was coming in and asking me did I know the lady, and I told you yes, and you said, did she ever come around your place, and I told you yes. And I was under the impression it was him, but I do know that you two were together but I was under the impression that he asked me about it but as far as me knowing that I was supposed to come up here or anyone told me to come up here, the first time I know that I was supposed to come up here was about an hour and something ago when a red cab drove up in front of the door and knocked on the door and I got out of the bed and out the door and

(Testimony of Bill Anders.)

he said, "They want you in court." I say, "What for," He say, "I don't know." Who sent him, how he got there, I didn't ask him. I know you are supposed to come to court, you are not supposed to hold up everything.

Q. Mr. Anders, we sent him. A. Oh.

Mr. Miller: That's all.

Recross-Examination

By Mr. Stevens:

Q. Didn't you talk to Mr. Urban before he came in here?

A. No, I havent seen him, I haven't seen that gentleman in two or three days. I haven't seem him.

Mr. Stevens: That's all.

Mr. Miller: That's all. Thank you.

(Witness excused.) [629]

Mr. Miller: Is Mr. Finley out there?

BURTON W. FINLEY

a witness called in behalf of the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Miller:

Q. Will you state your name to the Court, please, sir? A. Burton W. Finley.

Q. What do you do?

A. Officer, Department of Territorial Police.

Q. Do you know Myrtle Cathey?

(Testimony of Burton W. Finley.)

A. No, sir, I do not.

Q. Better known as Pat Cathey?

A. No, sir, I did not know her personally.

Q. Do you know Marvin Jennings?

A. Yes, sir, I do.

Q. How do you know him?

Mr. Stevens: Just a moment, Mr. Finley. Your Honor, I am going to ask for an offer of proof before we go further with this witness.

The Court: Very well.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Stevens: It is my information that [630] this is evidence which would tend to show an accusation of crime or one incident of bad character and I do not believe that such is admissible for impeachment. There is no other foundation laid for it. Under our code, only general reputation for truth and veracity or moral character is admissible.

Mr. Miller: As far as foundation is concerned, we have just got started on the foundation.

The Court: Of course, I don't know what counsel proposes to prove by this witness, but the Court will stop a specific instance that might reflect bad conduct.

Mr. Miller: Well, we ask the man here for the sole purpose of showing that the defendant was arrested on or about the, well, during the week, for carrying concealed weapons.

(Testimony of Burton W. Finley.)

His conduct was put in evidence as I recall due to the fact that he testified that he had never been in any trouble and had nothing pending and so on and so forth.

Mr. Stevens: This was an incident that happened after Mr. Jennings testified, to my knowledge. Therefore, it was something that he could not be impeached for, for having stated wrongfully on the stand. It is only evidence of bad character.

Mr. Taylor: It is coupled, your Honor, with the fact that his testimony here, his reputation that he was, had a reputation of being a panderer for lewd women. Now, since this matter has come up he was taken into custody and searched [631] and a loaded revolver was found on him and we think, your Honor, that it should be admissible to show——

The Court: Did that incident occur after the testimony here?

Mr. Miller: Yes: it did. In fact it was during ——

Mr. Taylor: After that.

Mr. Miller: As I understand it was all in the last week.

Mr. Stevens: Yes, there is no question that it happened but I believe even if he were in jail now for the same thing it wouldn't make any difference. He has not been convicted. **It is a accusation.**

Mr. Miller: It shows the character of the witness, all we wanted it for.

The Court: Of course, the Court doesn't construe that statute, impeachment statute as liberally

(Testimony of Burton W. Finley.)

as evidently you gentlemen do. Being new to the jurisdiction I have permitted you to proceed as the testimony came in yesterday about the defendant being a procurer. The Court was of the opinion that that was inadmissible for the purpose of impeachment.

Mr. Taylor: You mean as to the cab driver was a procurer?

The Court: Yes, the Court believes that it is limited to the general reputation for moral character and his [632] reputation such as to render a witness unworthy of belief. That is the Court's interpretation of it, but the government imposed no objection yesterday.

Mr. Stevens: Well, we have seen rather broad latitude on the type of character, your Honor.

The Court: Well, I think the Court will preclude the defendant from showing the witness was subsequently, subsequent to his testimony found with a concealed weapon on his person.

Mr. Taylor: There is one thing about this, your Honor, although the man was searched and a pistol, a loaded revolver was found on him, he was not prosecuted and I was informed by the police it was because he was a witness in this case.

Mr. Stevens: Well if you want to bring that out.

The Court: He might well have carried the weapon as a result of his testimony here. I don't know.

Mr. Stevens: Precisely, precisely why he had it.

(Testimony of Burton W. Finley.)

Mr. Taylor: He can also do it by getting a permit. I don't think he is in any better standing than anybody else.

The Court: You don't want to go into a collateral matter. You have your record made.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:) [633]

The Court: Any further question of this witness Mr. Finley?

Mr. Miller: Yes, your Honor.

The Court: Very well.

Q. (By Mr. Miller): Did you take any part in the investigation of this particular matter now on trial?

A. What matter is that, on the Urban case, sir?

Q. Yes. A. No, sir, I did not.

Mr. Miller: That's all.

Mr. Stevens: Thank you very much.

(Witness excused.)

Mr. Miller: The defendant rests, your Honor.

The Court: The government prepared to go into rebuttal?

Mr. Stevens: Yes. the government calls Mr. Williams.

The Clerk: Government's Identification No. 21.

(Prescription from Williams Drug was marked Government's Identification No. 21.)

GEORGE F. WILLIAMS

a witness called in behalf of the plaintiff in rebuttal,
was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Stevens): Will you state your name, please?

A. George F. Williams.

Q. What do you do, Mr. Williams?

A. I am the druggist.

Q. You have a drug store here?

A. 1328 South Cushman.

Q. Is that known as Williams drug Store?

A. George Williams.

Q. This is Government's Identification 21. Can you tell us what that is, Mr. Williams?

A. That is a prescription I filled on about, well, it was the 23rd day of January for Seconal. It is a mild sedative.

Q. How did you get that prescription?

A. Doctor Anderson phoned it.

Q. Do you remember when he phoned you?

A. No, I don't. It was Sunday.

Q. It was on Sunday? A. It was on Sunday.

Q. What hours are you opened on Sunday?

A. Nine in the morning until eleven at night.

Q. Sometime during that period?

A. Sometime during that period.

Q. Do you know who picked that up?

A. No, I don't. [635]

Q. When a person picks up such a prescription, Mr. Williams, they have to sign a book?

(Testimony of George F. Williams.)

A. No.

Q. There isn't anything, any papers or any receipts you have to sign to pick up such a thing?

A. Not at all.

Mr. Stevens: We offer that in evidence, your Honor.

The Court: Defendant's counsel see it?

Mr. Stevens: Yes, your Honor.

Mr. Taylor: We have no objection, your Honor.

The Court: It will be received.

Mr. Stevens: Your witness, Mr. Taylor.

The Clerk: Government's Exhibit K.

(Government's Identification No. 21 was received in evidence as Government's Exhibit K.)

Cross-Examination

By Mr. Taylor:

Q. Mr. Williams, do you know Mr. Urban, Leon Urban? A. I don't know him, Mr. Taylor.

Q. Do you recognize the gentleman sitting next to me here? A. No, I don't.

Q. What?

A. I can't truthfully say that I can. [636]

Q. Do you have difficulty seeing down here with the glasses? A. No.

Q. What? A. No.

Q. You can see plainly? A. I can see.

Q. Do you remember having at the time that these capsules were picked up, Mr. Williams, do you remember having a conversation with Mr. Urban

(Testimony of George F. Williams.)

regarding a dog? A. No, I don't.

Q. You remember a conversation about putting away a dog you said had been, you had a dog that you needed to put him away. Mr. Urban mentioned something about he had to have a dog put away one time?

A. I just don't recall. We get some, excuse me, people in the store like that, get all kinds of conversation.

Q. You got an old dog, Mr. Williams, that is getting quite old and may have to be put away?

A. I have a dog, ten years old.

Q. You remember any conversation about that with Mr. Urban at the time that he picked up the pills? A. No, I don't.

Q. If you did it made no impression your mind then? A. No. [637]

Mr. Taylor: That's all.

Mr. Stevens: Thank you, Mr. Williams. Wait a minute, just a minute. Has the Court ruled on that, please?

The Court: Yes, there was no objection.

Mr. Stevens: Thank you, Mr. Williams.

(Witness excused.)

Mr. Stevens: Call Mr. Henry Jarrell, please.

HENRY JARRELL

a witness called in behalf of the plaintiff in rebuttal
was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Henry Jarrell. J-a-r-r-e-l-l.

Q. You reside near Fairbanks here, or in Fairbanks?
A. Yes.

Q. Do you know where the Club Alibi is, Mr. Jarrell?
A. Yes.

Q. Would you tell us, were you there in January of 1955?

A. Somewhere right around there, right around the 31st, somewhere around there.

Q. Somewhere around the 31st?
A. Yes.

Q. Do you know what time it was when you went in there?

A. No, I don't know the exact time it was. I was coming [638] in from Eielson. I stopped in there to have a drink.

Q. Was there anyone else in there?

A. Three GI's.

Q. And a bartender?

A. Yes.

Q. Do you know who the bartender was? This gentleman here, Mr. Urban?
A. Yes.

Q. While you were in there did you hear any noises?
A. Yeah, I heard some woman.

Mr. Taylor: Just a moment, your Honor. We

(Testimony of Henry Jarrell.)

are going to object, improper rebuttal. It has not, been no testimony for direct examination about that, no, has not been raised on our cross-examination.

The Court: The government may proceed.

Q. (By Mr. Stevens): Did you hear any noises while you were in there?

A. Yes, I was only in there about five minutes.

Q. What did you hear?

A. Some woman in the room there moaning and groaning. That is all I heard.

Q. Did you hear the bartender say anything about that?

A. Well, yes, when she was moaning and groaning there, she, the bartender says, talking to these three GI's, he says, "I will go back there shut that bitch up." That is all I heard. [639] He went back there to the room. I got up and left.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. What time of the day was that?

A. I don't know what time of the day it was.

Q. Do you know what day it was?

A. Not exactly, no.

Q. Do you know what month it was?

A. It was in January.

Q. What year? A. '55.

Q. That the first time you ever been in there?

A. First time I ever been in there, yes.

(Testimony of Henry Jarrell.)

Q. When was you subpoenaed to appear before this Court? A. Saturday, I think it was.

Q. What? A. Saturday, I think.

Q. Saturday? A. Yeah.

Q. Did you volunteer to come in; who asked you to come in?

A. I don't know who the fellow was that brought the papers down. I never seen him before.

Q. Who did you talk to about coming down here?

A. I didn't talk to anybody. He just brought the papers [640] down, told me right on the papers.

Q. Somebody just picked your name out of the telephone directory then, issued a subpoena for you? A. Lieutenant called me in.

Q. Who?

A. Lieutenant down at the Highway Patrol down there.

Q. Oh, he looked you up? A. Yes.

Q. Or did you look him up?

A. He looked me up.

Q. What Lieutenant?

A. I don't know what his name is.

Q. How did he get your name?

A. I don't know that.

Q. And you say this gentleman sitting at my right was the bartender? A. Yes.

Q. What time of the evening was it?

A. I don't know what time it was.

Q. What did this groaning, what was said?

A. Didn't say anything, just moaning and groaning back there, all I heard.

(Testimony of Henry Jarrell.)

Q. Knock like that on the wall from there?

A. No, I never heard anything like that.

Q. Never heard that? [641]

A. I didn't hear any knock.

Q. Hear any words? A. No.

Q. Could it have been around the 19th of January?

A. No, I think it was, it was later than that.

Q. Later than what? A. Later than that.

Q. First of February? A. No.

Q. When? A. It was in January.

Q. What time in January?

A. It was along, right around the 31st.

Q. What? A. Right around the 31st.

Q. Right around the 31st? Maybe it was the 31st, is that right?

A. I wouldn't say for sure, it was the 31st. No, I'm not sure.

Q. Are you sure you were in the Alibi Club?

A. Yes, I am sure I was there.

Q. That the first time you ever been in there?

A. First time.

Q. Been there since?

A. Never have been there since. [642]

Q. In other words, you would come under the heading of a convenient witness, is that right, Mr. Jarrell?

Mr. Stevens: I object to that, your Honor.

The Court: Sustained.

Q. (By Mr. Taylor): Who did you first talk to about this?

(Testimony of Henry Jarrell.)

A. I don't remember ever saying anything about it except the lady down at the Four Corners down there used to go in there and have coffee all the time. That is the only——

Mr. Taylor: If the Court please, we move to strike all the testimony of this witness, testifying to fact that he has absolutely no recollection of the time, the day, the hour, as to alleged occurrence. I feel, your Honor, that it should not be allowed to go to the jury for indefiniteness.

Mr. Stevens: Mr. Anders couldn't even pinpoint the month, your Honor.

The Court: The Court will deny the motion.

Mr. Taylor: That's all.

Mr. Stevens: Thank you very much, Mr. Jarrell.

(Witness excused.)

Mr. Stevens: Call Mr. Bush, Mr. Floyd Bush.

FLOYD BUSH

a witness called in behalf of the plaintiff in rebuttal,
was duly sworn and testified as follows: [643]

Direct Examination

By Mr. Stevens:

Q. Could you tell us your name, please?

A. Floyd Bush.

Q. You live in Fairbanks?

A. 509 Eighth Street.

Q. Do you know where the Alibi Club is?

A. Yes.

(Testimony of Floyd Bush.)

Q. Do you know Curly Urban who has that Club? A. Yes.

Q. Have you been there at the Club?

A. Yes.

Q. Would you tell us when the last time you were in there in January of 1955?

Mr. Taylor: We object to the leading question, your Honor, pinpointing the month.

The Court: Yes, sustained. The question, I think the last time, there is no showing he was there in January of 1955. You asked him when was the last time in January he was there.

Mr. Stephens: Oh, yes, beg your pardon.

Q. (By Mr. Stevens): Were you there in January? A. Yes.

Q. When was the last time that you were there in 1955? [644]

A. I couldn't answer that question.

Q. Do you recall going there at all between the 22nd of January and the 30th of January?

A. Yes.

Q. Do you know what day it was that you went down there? A. Not definitely I don't.

Q. Would you tell us the time when you went down there, please?

A. Approximately a quarter till seven.

Q. What did you go there for, Mr. Bush?

A. I went down to see Curley concerning some stuff that we were selling at an auction sale.

Q. Did you hear any type of peculiar sounds while you were there? A. I heard a noise.

(Testimony of Floyd Bush.)

Q. What was that noise, sir.

Q. I heard a noise. It was behind walls. I would have no way of knowing what it was, who it was.

Q. Did you know what type of sound it was?

A. Well, it was a noise, it wasn't in the room we was in. It came from another part of the building.

Q. Well, would you describe the noise for us, please?

A. Well, I wouldn't know how to describe it.

Q. Did you know Pat Cathey?

A. I had met her. As far as I can remember I have met her twice. [645]

Q. Could you place this occasion in terms of the time when, or did you know that Pat Cathey had died first, did you know that she had died?

A. At the time I was out there?

Q. No, I mean did you know before you came here today? A. I read it in the newspaper.

Q. Well, now, can you place this visit of yours to the Alibi Club in relation to the time you read it in the newspaper?

A. It was the following issue of the newspaper after the night that I was out there.

Q. And——

Mr. Taylor: I didn't get that answer. Will you read it?

(Thereupon, the reporter read the last answer.)

Q. (By Mr. Stevens): Would you tell us the type of sound that you heard there, please?

(Testimony of Floyd Bush.)

A. It was a sound that attracted my attention to the extent that I asked Curley what in the hell it was.

Q. You can't describe the sound though?

A. You, I would have no reason to remember it well enough to describe it.

Q. Well, was it a person or——

A. Well, it would be, I wouldn't want to definitely say [646] that I knew it was a person. I took it for a person.

Q. Well, you say you asked Curley what it was?

A. I asked Curley, I said, "What in the hell is that?"

Q. And what was said?

A. He said, "That is Pat, she's got the flu."

Q. And the following edition of the paper, the newspaper came out, it was the next issue of the newspaper when you saw it? A. That's right.

Q. That she was dead, that is that is what the paper said? A. That is what the paper said.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. What day did you say you went there, Mr. Bush?

A. I didn't say the day. I said it was as to the date, I didn't say. I said I was out there.

Q. The day of the week, could fix that?

A. I can say it was the following issue of the paper I read in it that she was dead. The date I

(Testimony of Floyd Bush.)

would have no way of remembering the date, no reason for remembering.

Q. So it would be a week day then, if the next day's paper was published then, is that right?

A. It was evidently a Saturday or a Sunday night. [647]

Q. What?

A. It was evidently a Saturday or a Sunday night. I don't remember which it was. The following issue of the paper I read in the newspaper.

Q. It would be a Saturday or Monday?

A. I was out the evening before. It was the next day's issue of the paper because I read it.

Mr. Taylor: I think that is all.

Mr. Stevens: Thank you very much.

(Witness excused.)

The Court: Shall we take a recess before the next witness.

Mr. Stevens: Yes, sir; thank you.

The Court: Members of the jury, once more it is my duty to admonish you do not discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; do not form or express any opinion thereon until the case is finally submitted to you. Court will recess for ten minutes.

The Clerk: Court will recess for ten minutes.

(Thereupon, at 4:05 p.m., the Court took a recess until 4:15 p.m., at which time it reconvened and the trial of this cause was resumed.)

Mr. Stevens: We will stipulate that all members of [648] the jury are here, your Honor.

Mr. Taylor: The defendant will also.

The Court: Let the record show the presence of the defendant. You may proceed, gentlemen.

Mr. Stevens: Call Mrs. Legerat, please. She is right outside.

ELAINE LEGERAT

a witness called in behalf of the plaintiff in rebuttal,
was duly sworn, and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Elaine Legerat.

Q. Spell the last name, please.

A. L-e-g-e-r-a-t.

Q. Where do you live, Mrs. Legerat?

A. At the present time?

Q. Yes, mam. A. 24th and Cushman.

Q. And do you know Mr. Urban? A. Yes.

Q. Did you know Pat Cathey? A. Yes.

Q. How long did you know Pat Cathey?

A. Approximately five months, I think. [649]

Q. Did you know her during the month of December? A. Yes.

Q. That is, December 1954? A. Yes.

Q. Do you know where she was living at that time? A. Yes.

Q. Where was that, please?

A. At the Alibi Club.

(Testimony of Elaine Legerat.)

Q. Did you ever see her there at the Alibi Club?

A. Yes.

Q. Do you recall whether or not you saw her there in the latter part of December, 1954?

A. Yes.

Q. Do you remember what approximate date that was?

A. Oh, it was a little bit after Christmas. I am not sure of the date.

Q. What? A. It was before the new year.

Q. What time did you go there?

A. Around four or five in the afternoon.

Q. And who was there? A. Pat.

Q. Was the bar open?

A. No, she opened the door for me.

Q. Did you notice her physical appearance at that time? [650]

A. She had a black eye.

Q. Do you know how she got that black eye?

Mr. Taylor: Just a moment, your Honor. We are going to object. It would be hearsay.

The Court: I believe that's right. I will have to sustain that. She can answer if she knows. The question I believe is do you know.

Mr. Stevens: The question is do you know.

The Court: You can answer yes or no.

Mrs. Legerat: I only know what she told me.

Mr. Taylor: We object.

The Court: Sustained.

Q. (By Mr. Stevens): Did you notice any of the rest of her body at that time?

(Testimony of Elaine Legerat.)

A. Yes, she had; she showed me some black and blue spots on her back.

Q. Did you, did she show you anything else at that time?

A. Besides the black and blue spots she went in the back room of the bar where she stayed and brought out a ball of hair and said that——

Mr. Taylor: Just a moment. Don't testify to what she said. We object, your Honor, upon the grounds testifying to what was said.

The Court: Yes; the court will caution the witness [651] not to state what Miss Cathey said.

Mr. Stevens: Well then, I move to strike all of Mr. Urban's testimony concerning what Miss Cathey said, your Honor.

The Court: Do you wish to approach the bench on an offer of this witness.

Mr. Stevens: Yes, your Honor, I will.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Does the government contend that the witness on the stand may properly testify to what the deceased victim stated to her?

Mr. Stevens: Well, we had a serious question about it, but as I remember right at the very first of the trial I made an objection. It may not have been specific enough, I mean at the very first of Mr. Urban's testimony I made an objection concerning the content of what was said and the Court

(Testimony of Elaine Legerat.)

permitted the testimony to go ahead. I understand that there is a theory upon which statements of the deceased may be in, other than dying declarations. However, it was a little broad as far as I was concerned then, but in view of the repeated testimony concerning what she said, I felt that this subject could be properly covered. If it is not properly covered why then I believe that we should instruct the jury [652] that they must disregard everything that Mr. Urban has said concerning what Mrs. Cathey told him.

The Court: Of course, the Court is now faced with the proposition as to whether the government contends that this witness is competent to testify to statements of the deceased victim and if there is an exception to the hearsay rule that would apply. The Court is unaware of it but it is important and I which to give the government an opportunity to convince the Court. It is an important matter.

Mr. Taylor: I think something that far prior to the death of Miss Cathey certainly would not be competent to show, to prove any of the elements of the crime.

Mr. Miller: It is definitely hearsay.

The Court: Oh, if this were a statement by the defendant the Court would quickly permit it over any kind of an objection. The time element doesn't bother the Court. It is whether or not this is an exception to the hearsay rule.

Mr. Miller: I can't think of one.

Mr. Stevens: I can't think of one either except

(Testimony of Elaine Legerat.)

as I say, the testimony has been replete here concerning what Mr. Urban has said she said and what other people have said she said. Mr. Anders continued with what she said. Counsel for the defense has offered repeated testimony of what she said.

Mr. Miller: What Mr. Anders testified to was what, [653] basically was what Mr.—

The Court: Oh, many witnesses have testified to what Cathey said. Mrs. Hetherington and others have testified to what Miss Cathey said.

Mr. Taylor: Well, they have, I think if this had been brought in on direct, but I don't think we would have raised it, but it is a rebuttal. It means us calling other witnesses.

The Court: If your only objection is it is not proper in rebuttal—

Mr. Miller: Oh, no, we are not. We are using the objection of hearsay.

Mr. Taylor: Oh, no, we are not. We say it is hearsay only.

The Court: I, you think, Mr. Stevens, you can find any authorities for the Court on this proposition?

Mr. Stevens: No, I don't.

The Court: I mean, I'm afraid of it.

Mr. Stevens: But on the other hand, I believe in view of the record concerning the repeated assertions of what Mrs. Cathey said and I questioned Mr. Urban specifically about this instance if your Honor will recall. I asked him about this lady who was pregnant and if he didn't know of this conversatio

(Testimony of Elaine Legerat.)

with Pat and this lady, but is is my understanding at this time that he was not present from what Mrs. Legerat said. [654]

Mr. Miller: That still doesn't get around the hearsay evidence rule. As far as striking other witnesses that testified to that, you would just about have to take a transcript and read to the jury the transcript and say now, strike this and this. Now, that would be most dangerous. It would be highly prejudicial.

Mr. Stevens: Well, Mr. Anders testified here a few minutes ago at some length.

Mr. Taylor: There has been as much hearsay brought out by one side as there has in the other.

The Court: And, of course, the record will speak for itself, but I don't think the Court has overruled hearsay objections.

Mr. Stevens: Very well, your Honor.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:)

Q. (By Mr. Stevens): Was Mr. Urban present during any of these times when you were there with Pat Cathey, these two times that you have testified to right now? A. No.

Q. Did you discuss this subject with Mrs. Cathey at any time when Mr. Urban was present?

A. About the bruises on her body you [655] mean?

Q. Yes. A. Yes.

(Testimony of Elaine Legerat.)

Q. When was that?

A. Well, on January, about January 12th she told me to look at her forehead. She said that her hair had grown back in or was starting to grow back in.

Q. Was Mr. Urban there at that time?

A. No.

Q. When was it that you say he was there, was he present at any time, Mrs. Legerat, when you were talking to Mrs. Cathey concerning this matter?

A. Not concerning the bruises, no.

Q. Well, when was it that he was present when you were talking to Mrs. Cathey?

A. Well, I can't name any specific date, but several times when we went there in the evenings to drink or that, why he was around and one time in particular I remember we were talking about her children and he appeared quite disgusted with it because she was drinking and melancholy and told us to forget about it.

Q. Mr. Urban told you that?

A. Yes.

Mr. Stevens: Your witness.

The Court: Mr. Stevens, I wonder if you could determine from this witness whether she had any conversations [656] with the defendant on or about this time concerning these matters.

Mr. Stevens: Thank you.

Q. (By Mr. Stevens): Did you talk to Mr. Urban concerning any of these matters while Mrs. Cathey was alive?

A. Not that I can remember.

(Testimony of Elaine Legerat.)

Mr. Stevens: Thank you very much. Thank you, your Honor. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Miller:

Q. Did you testify to a ball of hair?

A. Pardon me.

Q. Did you testify to a ball of hair that she went back and got?

A. Yes, she showed me a ball of hair.

Q. That was a ball like a baseball or golf ball, something like that?

A. About the size of a junior size bowling ball.

Q. It was a ball?

A. Yes. Well, it was loosely put together so that it was about the size of a junior sized bowling ball.

Mr. Miller: That's all. Thank you, mam.

(Witness excused.)

Mr. Stevens: Pardon me just a minute. I will find [657] the name of this witness.

FRANK J. GUSKEY

a witness called in behalf of the plaintiff in rebuttal, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Frank J. Guskey, Junior.

(Testimony of Frank J. Guskey.)

Mr. Taylor: Just a little louder, please.

Mr. Guskey: Frank Guskey. G-u-s-k-e-y.

Q. (By Mr. Stevens): You live here in Fairbanks, Mr. Guskey? A. Yes.

Q. Do you know Mr. Urban, Curly Urban?

A. Yes.

Q. Are you acquainted with the Alibi Club down in South Fairbanks? A. Yes.

Q. And did you know a Myrtle Cathey? Pat Cathey? A. Yes.

Q. Were you in the Alibi Club during the month of January, 1955, at all? A. Yes.

Q. Do you recall approximately when you were there? A. No. [658]

Q. Do you recall whether you were there between the 22nd of January and the last day of January?

A. Yes.

Q. Who went there with you, do you know?

A. Nobody. Not that I remember.

Q. You went alone? A. Yes.

Q. What time of day did you go there?

A. In the evening.

Q. How many times did you go there?

A. At least two times a week.

Q. You recall two times now? A. Yes.

Q. Do you know, or do you recall what day of the week it was? A. No.

Q. Did you go there two successive evenings or two evenings in the same week or how was it?

A. I don't think they were two successive evenings.

(Testimony of Frank J. Guskey.)

Q. I beg your pardon?

A. I don't believe they were two successive evenings.

Q. Were they in the same week? A. Yes.

Q. While you were there was Curly there?

A. Yes. [659]

Q. Did you see Pat? A. No.

Q. Did you hear any sounds there at the club?

A. Yes.

Q. What did you hear?

A. I heard Pat in the back room. I don't know if it was Pat, I thought it was, moaning and groaning, something like a sick person.

Q. At that time did you hear any comment by Mr. Urban? A. Yes.

Q. What did he say at that time?

A. "Goddamit, Pat, shut up," words to that effect. I am not quoting him.

Mr. Stevens: Thank you, Mr. Guskey. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mr. Guskey, who is the lady that went there with you to the Alibi Club?

A. I didn't go with anybody.

Q. What? A. I didn't go with anyone.

Q. You never took a lady to the Alibi Club?

A. I have before, but not that time.

Q. I mean before that, whose wife was it you

(Testimony of Frank J. Guskey.)

took there? [660] A. Mrs. Van Cleave.

Mr. Stevens: I object to that, your Honor.

Q. (By Mr. Taylor): What?

A. Mrs. Van Cleave, Junior.

The Court: We are concerned now with the dates between the 22nd and the 30th of January, 1955.

Q. (By Mr. Taylor): You say Mrs. Van Cleave?

Mr. Stevens: I object to any further questioning unless the date is established.

The Court: Sustained.

Q. (By Mr. Taylor): Well, when did you, how long had you known Pat Cathey?

A. I don't remember just——

Q. What?

A. I don't remember, not too long before that.

Q. November?

A. I'm not sure. I don't think she was there the first time I went in the club.

Q. Well, when was the first time you went in there?

A. I believe it was toward the end of November. I am not positive.

Q. When was it you took Mrs. Van Cleave there?

A. I don't remember that either. Her husband was there, too. [661]

Q. And did you ever go there to visit Pat?

A. No.

(Testimony of Frank J. Guskey.)

Q. And isn't it a fact, Mr. Guskey, that you propositioned Pat to go out with you?

A. No.

Q. What? A. No.

Mr. Taylor: That's all.

Mr. Stevens: Thank you, Mr. Guskey.

(Witness excused.)

Mr. Stevens: Call Florence Harris, please.

FLORENCE HARRIS

a witness called in behalf of the plaintiff in rebuttal,
was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you tell us your name, please?

A. Florence L. Harris.

Q. Where do you live, Mrs. Harris?

A. Thirteen mile.

The Court: I think you would like an amplifier
to help your voice carry in the room?

Mrs. Harris: I think so.

The Court: Very well. [662]

Q. (By Mr. Stevens): Now, did you know a
Pat Cathey? A. Yes, I did, sir.

Q. Do you know Curly Urban?

A. Yes, I do, sir.

Q. How long did you know Pat Cathey?

A. Oh, about two and a half months, three

(Testimony of Florence Harris.)

months. About three months, two and a half to three months.

Q. Do you know where she was living?

A. At the Alibi Club.

Q. Were you friendly with Mrs. Cathey?

A. Well, sort of friendly with her, yes.

Q. Did you ever visit her there at the Alibi Club? A. Definitely, yes. Many times.

Q. Did, during the time you knew Mrs. Cathey, did you ever observe any types of marks on her body? A. Yes, I did.

Q. Where were those marks?

A. On her body, on her sides and also on her thighs and her eyes.

Q. Did you ever notice any particular mark?

A. Well, she showed me one particular mark, it was after Christmas, that he, Curly had supposed to have hit her with a ring.

Mr. Taylor: Just a moment, your Honor. We are going [663] to object to any hearsay testimony.

The Court: Sustained. She may tell what she saw.

Q. (By Mr. Stevens): Did you see the mark yourself? A. Yes, I saw the mark.

Q. Did you notice the type of mark it was?

A. Well, it was an oblong mark, but whether it was definitely a ring mark or not I couldn't tell.

Mr. Taylor: Just a moment, calling for a conclusion as to what caused the mark.

The Court: Sustained as to that. She said it was an oblong mark. That may stand.

(Testimony of Florence Harris.)

Mr. Stevens: Yes, Mrs. Harris, you are not to try, try not to tell us what Mrs. Cathey told you. That would be hearsay. You are not allowed to tell that here.

Q. (By Mr. Stevens): Were you there on Christmas Eve at the Alibi Club? A. Yes, sir.

Q. And who was there at that time?

A. Pat and Curly and Al and myself. I think there was a couple of other people there, I'm not too sure. GI's or something.

Q. What time was that that you were there?

A. Oh, just before midnight.

Q. And where was Curly? [664]

A. He was behind the bar.

Q. And would you tell us where Pat was at that time?

A. She was sitting at the end of the bar.

Q. Did you witness anything that occurred at that time?

A. Yes, they sort of had an argument and they were swearing at each other. Then after that he gave her a slap, a clout around the face, caught her in the face and ear. He gave her a back-hand, that is what it was.

Q. Was he behind the bar at that time?

A. Oh, yes. He was behind the bar and he knocked her off the stool. He hit her from where she was sitting.

Q. Did you ever witness any other type of violence take place then between Mr. Urban and Mrs. Cathey?

(Testimony of Florence Harris.)

A. Well, on one occasion, but I don't really remember that.

Q. Now, did Mr. Urban talk to you concerning your testimony here, Mrs. Harris?

A. Oh, he spoke to me yesterday morning.

Q. What did he tell you yesterday morning?

Mr. Taylor: If the Court please, I don't believe that would be admissible, going to prove or disprove any of the issues of this case.

The Court: If he talked to her relative to her testimony in this case she may state what he said.

Q. (By Mr. Stevens): Was it relative to her being in Court? [665]

A. Yes, it was. He didn't want me to testify. He told me I should kind of hide.

Q. And why was that?

A. Well, I really don't know. In a way he said it would be bad for my citizenship.

Q. Have you an application for citizenship?

A. Yes, sir.

Q. Did you talk to Mr. Urban about this case any other place other than here? A. Yes.

Q. When was that?

A. Mr. Miller's house.

Q. How long ago was that?

A. Last week.

Q. Did Mr. Urban say anything to you at that time after you talked to Mr. Miller?

A. No, he, well, he just said that I should go and hide. He told my friend that, too.

Mr. Stevens: Your witness, Mr. Taylor.

(Testimony of Florence Harris.)

Cross-Examination

By Mr. Miller:

Q. I might ask you, how did you happen to be at my house?

A. Well, Curly sent me home with a message to tell Al that Curly wanted to see him and Mr. Taylor wanted to see me [666] in his office, so we got down to Mr. Taylor's office and he wasn't there so we were driving and we saw Curly on the street and we were going to meet him later and then he told us that you wanted to see us. I didn't know who you were at all.

Q. How long were you at the house?

A. Oh, only about five minutes, five or ten minutes.

Q. Were you asked to leave?

A. Well, you had to go out if you remember.

Q. And when you told me what your story was, did I tell you that I didn't have anything to talk with you about?

A. That's right, yes, you did. After I made one statement you said that was enough.

Q. Now, to get into the testimony after clearing myself, were you ever present at the Alibi Club when Pat Cathey came in with money that she had taken from some person?

Mr. Stevens: I object. That is outside of the scope of the direct examination.

The Court: Sustained. You may call her as your witness.

(Testimony of Florence Harris.)

Q. (By Mr. Miller): Now, at the time you stated that Curly slapped Pat were there, did they have several words prior to the altercation?

A. Yes, they did.

Q. Did they quarrel quite a long time?

A. No, not very long, a matter of a few minutes. [667]

Q. She call him some pretty bad names?

A. They both did.

A. They were both pretty bad? A. Yes.

Q. Did you, strike that, please. Did you see the two of them together that evening?

A. No, I didn't. Al and I, we went home.

Q. Did they go into another room?

A. Yes.

Q. And did you see them ever happy and contented with each other later on that evening?

A. Will you repeat that, please?

Q. Did you ever see them contented and happy with each other later in the evening?

A. No, I didn't see them after that because after he had given Pat her present, Christmas present, we had got one drink and then we went home.

Q. After they came back in out of the other room, what happened?

A. Curly gave Pat. Pat came out and she showed me the nice watch that Curly had given her for Christmas.

Q. Curly had given her a watch you say?

A. Yes.

Q. Did you see that watch? A. Yes.

(Testimony of Florence Harris.)

Q. Was it a nice watch? [668]

A. A very nice watch.

Q. Did they seem to be getting along when you left?

A. Well, it was sort of quieting down then. I think they were going to close up. I mean we didn't really take very much notice of it after that.

Q. The event didn't cause too much commotion then, is that so?

A. Well, it was none of our business, frankly.

Q. Did you ever see any cuts on her, on her person, on her body?

A. No. I have seen a lot of bruises though.

Q. Bruises but no cuts?

A. No, I don't remember any cuts.

Q. Did you ever observe any bruises on her person caused by any other than Curly Urban?

A. Well, I can't really answer that question because the, I never saw anybody else hit her.

Q. Do you know of your own knowledge of any trouble she had with any other person?

A. No, I don't.

Q. You don't.

A. Not exactly, will you——

Q. Do you know of any other, do you know of any quarrels or fights that she had with any other person?

A. No. No. [669]

Q. Do you know of any argument that she had with any other person over money?

A. Yes, yes on one occasion.

(Testimony of Florence Harris.)

Q. And what was that?

Mr. Stevens: I object, your Honor. However, it is beyond the scope of cross-examination. If your Honor will permit me to exercise the normal cross-examination so we won't have to recall this witness, why Mr. Miller can exceed this scope. Would that be agreeable?

Mr. Taylor: That's all right.

The Court: Very well, you may proceed as your own witness now, is that right?

Mr. Miller: Yes.

The Court: Very well.

Q. (By Mr. Miller): What was this other problem over the money that you mentioned?

A. Well, it happened, I couldn't tell you the date when it happened, but I was in the bar one night and my friend had gone down to town and it was so cold, so I was waiting for him to come back and there was an elderly man came in and demanded, I think it was the sum of two sixty or two eighty that Pat had taken from him or stolen from him. No, I didn't see her take this money, and he came in and then Curly, he was going to call the police and then Curly came back [670] and he squared it with a fifty dollar bill or sixty dollars. I don't, he said one or the other. Now, I didn't see either Curly give that money to this man.

Q. You, Curly wasn't there when the man came in?

A. Not at the time, no. He came in within five minutes afterwards.

(Testimony of Florence Harris.)

Q. Was Pat there?

A. Oh, yes, I was sitting next to her.

Q. And was the man quite perturbed with Pat?

A. Yes. Yes.

Q. Was there any altercation or any blows exchanged between Pat and this man?

A. Oh, no. The man was right the other side of the bar and he didn't raise too much fuss about it.

Q. You say Curly paid him?

A. Yes. Now, Curly told us that he gave him fifty dollars. Now, I didn't see Curly give him that money.

Q. You know the man did leave and seemed to be satisfied?

A. Yes, yes.

Q. And you couldn't testify whether Curly gave him back the full two fifty or sixty or what he gave him?

A. No, no, I couldn't.

Q. Did Curly go around Pat so that he could get the money from Pat that she had taken from this man?

A. No, not while I was sitting there, no. He didn't even talk to Pat. [671]

Q. Curly take the man outside?

A. No, he took him into the other room where the juke box is.

Mr. Miller: I believe that is all. Thank you, mam.

(Testimony of Florence Harris.)

Redirect Examination

By Mr. Stevens:

Q. Did you have any idea at that time of your own knowledge what that money was for?

A. No, I didn't. I didn't see him give the money.

Q. I mean, how Pat had gotten the, you said that it was money that was stolen?

A. Well, I didn't see it as I was just saying, but this man had said the word he used, he had rolled for it.

Mr. Stevens: Your witness, Mr. Miller.

Mr. Miller: We have no further questions.

Mr. Stevens: Thank you.

(Witness excused.)

Mr. Stevens: Your Honor, we have two witnesses left. Both of them have been called for tomorrow morning at ten o'clock. We could obtain one of them if your Honor wishes to continue on in the evening, but we could request that we reconvene tomorrow morning at ten and that will finish the government's witnesses.

The Court: What does the defendant prefer. It is ten minutes of five now? [672]

Mr. Miller: We have no objection to adjourning until tomorrow, your Honor.

The Court: Members of the jury, once more I admonish you not to discuss this case with anyone; do not permit anyone to discuss it with you; do not

listen to any conversation concerning the subject matter of this trial; and do not form or express any opinion thereon until the case is finally submitted to you. You will, please, return to your places at ten o'clock tomorrow morning.

The Clerk: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 5:00 p.m., the trial of this cause was adjourned until May 25, 1955, at 10:00 a.m.)

May 25, 1955—10:00 A.M.

Be It Remembered, that upon the 25th day of May, 1955, at the hour of 10:00 a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Let the record show the presence of the defendant, Leon D. Urban, criminal cause 2020. His attorneys are also present, and the government attorney. The Clerk please call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.) [673]

The Clerk: They are all present, your Honor.

The Court: Very well. The defendant ready to proceed?

Mr. Taylor: Yes, your Honor, the defendant is ready.

The Court: The government ready?

Mr. Stevens: Government is ready.

W. M. BETTIS

a witness called in behalf of the plaintiff in rebuttal, was duly sworn, and testified as follows:

Mr. Stevens: Before Mr. Bettis begins, your Honor, it is the government's belief that the tape recording from the coroner's inquest is not admissible before the jury. However, if the Court and counsel for the defendant would like to hear that tape prior to Mr. Bettis' testimony, we would be perfectly willing to bring it in and play it. It is a matter of Court and counsel as I see it.

Mr. Taylor: No, we are not interested in it, your Honor.

The Court: Very well.

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. W. M. Bettis.

Q. Where do you reside, Mr. Bettis?

A. Alaska Railroad hut area. [674]

Q. Were you connected at all with the inquest pertaining to Myrtle Patricia Cathey?

A. Yes, I was.

Q. Do you recall when that was held?

A. February the 11th.

Q. Of this year? A. 1955.

Q. And where was that inquest held?

A. In the United States Commissioner's office in this building.

(Testimony of W. M. Bettis.)

Q. And what was your connection with that inquest, Mr. Bettis?

A. I was a member of the jury.

Q. Was Mr. Urban there? A. Yes, sir.

Q. Did you see Mr. Urban take part in that inquest? A. Yes, sir.

Q. Do you know whether or not he was sworn as a witness? A. He was.

Q. And was that, did that take place in your presence? A. Yes, sir.

Q. Do you recall at this time whether or not any question was asked Mr. Urban concerning the date upon which he went to Players Club to secure Mrs. Cathey? A. Yes. [675]

Q. Do you recall at this time the answer as best as you can remember it that Mr. Urban gave?

A. It was on January 21st, 1955, that he went and picked Mrs., Miss Cathey up at the Players Club.

Mr. Stevens: Pardon me, your Honor. Mr. Taylor, would you agree if we take Mr. Bettis off the stand temporarily and ask Mr. Haggland to take the stand, Doctor Haggland.

Mr. Taylor: I have no objection.

Mr. Stevens: Mr. Bettis, would you step down, please. Thank you very much. We will call you right back.

DR. PAUL B. HAGGLAND

a witness called in behalf of the plaintiff in rebuttal, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Paul B. Haggland.

Q. And what is your profession, Mr. Haggland?

A. Orthopedic surgeon.

Q. How long have you been in that profession?

A. About eighteen, nineteen years, I guess.

Q. Now, are you a qualified physician and surgeon under the laws of the Territory of Alaska?

A. Yes, I am.

Q. Have you had experience in the course of your practice [676] which pertains to the effect of pulling of hair upon the scalp?

A. I have had experience with traumatic injuries to the scalp, avulsion.

Q. Could you explain to us, Doctor, what the general construction is that holds the scalp to the head that prevents it from being pulled away?

A. Well, the scalp has a structure, it is really composed of five layers. As we see it from the outside it will be the cutaneous layer with the hair more or less, and then there is the telasubcutanea, which is a firm layer in the scalp. It is rather fibrous in its deeper part. That is why we get so much bleeding. Then we have a third layer which is interposed between the muscles in front and back, and

(Testimony of Dr. Paul B. Haggland.)

then we have a fourth layer beneath the galea and then the periosteum over the skull, the tough covering over the skull itself from which bone is nourished.

Q. Doctor, assuming that a woman approximately a hundred sixty to a hundred sixty-eight pounds taken by the hair with both hands and pulled out of a vehicle and across a space of ten to fifteen feet, would you have an opinion at this time as to the effect on the scalp of that pulling?

A. It depends, of course, upon how much force was used and whether it was a jerk or reasonably steady pull. I think if you were to ignore the fact that the woman weighed a hundred sixty-eight pounds and was not lifted, her entire weight [677] with that, that would be different.

Q. She was pulled across the ground with that, by her hair, hair in both hands?

A. Then I think the amount of weight you were pulling is problematical. That could not be decided. If she were suspended by her head and her heels touching you would only have half of it as you pulled on the hair.

Q. Well, would you have an opinion as to whether or not the hair would be pulled away, the scalp would be pulled away from the head as a result of that pull?

A. It would stretch. I doubt if it would be detached.

Q. And if it did detach, Doctor, where would the hemorrhages be located or would there be hemorrhages first?

(Testimony of Dr. Paul B. Haggland.)

A. Well, if the scalp itself was evulsed, not torn around the edges, then we would have a hemorrhage, but that hemorrhage would be limited in its extent anatomically.

Q. Where would it be located in your opinion?

A. It would come to the supraorbital ribs and back to the superior nupital line and along here because blood could not get beyond the aponeurotic detachment to the skull. It does not do that.

Q. Have you known of any instances in which the pulling of the hair by another human has resulted in detachment of the skull from the scalp?

A. Never have except common practice in the American [678] Indians, scalp with a knife.

Mr. Stevens: Thank you, Doctor.

Cross-Examination

By Mr. Miller:

Q. Doctor Haggland, if a party weighing as Mr. Stevens suggested between one sixty and a hundred sixty-eight pounds were taken out of a taxicab by the hair of her head, which would evidently let their weight fall out, would that be such a sudden jerk as you were speaking of in your opinion?

A. I doubt it. They would slide out of a cab if they were pulled by the hair.

Q. Then in your opinion they would never at any time have their full weight on the hair of their head? A. That's right.

Q. Assuming that she was drunk and completely relaxed or passed out, would that have any effect

(Testimony of Dr. Paul B. Haggland.)

upon the, upon her weight, upon the pressure put on her skull as she was being drug, the pressure upon your scalp, I mean, instead of skull?

A. I don't think it would appreciably. I think she would be subjected to more pull on her scalp if she was resistant. If she were drunk she would be relaxed and come as an inert body.

Q. All right, now, if she were dragged along the ground and up two steps and into a building and the added friction of lifting her up those steps as she came up and into the building [679] would that be such an added weight that you think it would effect her scalp in any way?

Mr. Stevens: I object to that, your Honor. I don't believe there is any evidence of any steps involved in this transaction.

The Court: The Court doesn't recall the testimony as to the number of steps to the building unless counsel can convince the Court that that was the testimony I will have to sustain the objection.

Mr. Miller: If the Court please, I believe that he testified that she was dragged into the building.

The Court: Yes.

Mr. Miller: Well, perhaps I am adding the distance. I have been out there.

The Court: I don't recall any testimony as to the number of steps.

Mr. Miller: I don't recall that there was.

Q. (By Mr. Miller): Supposing that she was dragged into a building and assume the building was not upon the same level, I believe the Court will

(Testimony of Dr. Paul B. Haggland.)

allow us to go to that extent, dragged into a building, would that effect the weight and the effect placed upon her skull, her scalp by dragging her in?

A. I think without a doubt it would. Another factor that would have to be considered, it depends on how much hair you have got ahold of, where you are applying your force on the scalp. [680]

Q. Now, contending that there were two handful of hair and she was being dragged and her feet were dangling behind her, she was completely relaxed and being dragged in, would there be any of those membranes of those five layers of scalp that you mentioned, would any of those tear loose?

A. They could separate.

Q. And if they did separate, what would be the effect of that?

A. It would be an extravication of blood and it usually occurs beneath the galea itself and that is self-limited in its extent around the periphery. It cannot go beyond certain limits because of the structure of the scalp and the way it is attached.

Q. But it would settle to the various portions?

A. It tends to go around the vortex of the skull and the scalp in the center.

Q. There are one or two layers that are very, very thin membrane?

A. That is correct. It is there where the skull is thin that is where abscesses and hemorrhages do occur when they separate.

Q. And if there were any separation that would probably be the first to give way, would it not?

(Testimony of Dr. Paul B. Haggland.)

A. That would probably be the first unless there was a tear in the margin of the scalp itself. [681]

Q. Now, exactly which layer of the scalp is that, Doctor?

A. That would be the fourth layer from the outside in.

Q. And that would——

A. That is not the most vascular layer however. The most vascular layer is in the deep subcutaneous layer.

Q. That would be the fifth?

A. No, that is the second layer.

Q. There would be considerable bleeding though if the fourth and most tender layer were torn, is that——

A. There could be a reasonable amount of bleeding, but——

Q. And if the, if it were shown that this party were dragged, was dragged out of a taxicab onto the ground and then being drunk, in a state of unconsciousness were dragged for ten or fifteen feet to a building and then into a building, in your opinion would that tear the scalp, the skull loose from the scalp?

A. It could have detached a little of it or loosened it, ruptured a few of the vessels, yes.

Q. Would it cause the scalp to become bruised, black and blue or noticeably bruised?

A. That deep type of hemorrhage doesn't discolor as a rule on the surface.

(Testimony of Dr. Paul B. Haggland.)

Q. If there were no deep type hemorrhage then would just the pulling of the hair in such a way, would that cause [682] the scalp to be discolored?

A. If there was rupture of the vessels in the subcutaneous tissue, yes.

Q. Would such a weight as that and under those conditions pull the hair out?

A. Some of the hair I naturally suppose would come out because the pull would not be even. There would be strands which would have more purchase than others.

Q. Under certain conditions it would then pull patches of hair out in your opinion?

A. That's right.

Q. And could such a pulling as this cause a hematoma of the brain?

A. No, it couldn't. There is an interesting thing about hemorrhage. As you get to the last layer over the skull that the hemorrhage is beneath the covering of the boney part itself is limited by the suture lines, or the lines from which our skull grew, so it is rather sharply demarkated unless there is a fracture across those lines.

Q. It is possible then that it would pull the scalp loose from the skull?

A. Yes, it would be possible to detach a portion of it over this portion.

Q. And if it didn't detach the scalp from the skull, it would either pull either strands of hair, patches of hair would be pulled out of her head or

(Testimony of Dr. Paul B. Haggland.)

there would be discoloration from [683] the pulling of the hair, would there not?

A. Not necessarily unless there was actually tearing out of a lot of hair.

Q. In your opinion, could a person be dragged by the hair of their head in such a way that it wouldn't pull patches of hair out, a person weighing a hundred sixty-eight pounds?

A. Well, it would depend on the type of hair they had, how long it was, was it in a, so it could be grasped, the entire mass of hair.

Q. This is assuming that this party had long hair?

A. There could be hair pulled out.

Q. All probability would be?

A. Oh, sure, some fibers. I think I can take my fingers and pull hair out of anyone's head.

Q. And likely if the party were dragged by the hair, it would pull out patches, would it not, Doctor?

A. Well, if there were patches you would have to speak more in terms that they, a few strands of hair let us say. A large patch probably wouldn't come.

Mr. Miller: I believe that is all.

Redirect Examination

By Mr. Stevens:

Q. Doctor, if a woman has long hair and two hands are used in grabbing that hair, is it possible to lift her right off her feet with that hair without injuring her scalp? [684]

(Testimony of Dr. Paul B. Haggland.)

A. It has been done. Done in sideshows.

Q. And assuming this was a steady pull in the hypothetical questions Mr. Miller has asked you concerning this pulling out of a cab and across this distance and into the building, would you believe that, or would you have an opinion as to whether or not the result would have happened that we have been describing, pulling the scalp away from the skull, you said it could have happened but do you believe with a steady pull of two handfuls of hair, a woman with long hair, that the scalp would have been pulled off?

A. Well, under a normal circumstance I am sure it wouldn't. If we were to carry out a demonstration.

Mr. Stevens: Thank you very much.

Mr. Miller: That is all, Doctor. Thank you.

(Witness excused.)

W. M. BETTIS

the witness whose testimony was interrupted to hear the testimony of the witness, Dr. Haggland, resumed the stand for further direct examination.

Q. (By Mr. Stevens): Do you recall, Mr. Bettis, whether any question was asked Mr. Urban concerning the condition of the marks upon Miss Cathey's body and in particular whether there were any marks that had been shown him?

A. Yes, I do. [685]

Q. Would you tell us the best of your recollection what he answered in regard to that?

(Testimony of W. M. Bettis.)

A. Well, I believe he stated there were marks on her hip and her breast and a cut lip and at different times he had shown, she had shown Mr. Urban bruises on her arms.

Q. Any particular type of bruises on the arms?

A. No, just bruises.

Q. Do you recall any question, do you recall whether a question was asked Mr. Urban concerning the girl which was alleged to have, or woman which was alleged to have beaten Mrs. Cathey up?

A. Yes.

Q. Would you tell us the best of your recollection at this time what he told you concerning that woman?

A. Mr. Urban told the jury that Mrs. Cathey told him she had been in a fight with a woman by the name of Bessie or Bell. She didn't know any last name.

Q. Do you know whether or not Mr. Urban was asked at that time whether he had heard of a person of the name mentioned who was acquainted with Mrs. Cathey?

A. Yes, I believe he was asked and he said he had, the lady's first name, I believe, was Peggy but he didn't know the last name of a woman that was acquainted with Cathey, Miss Cathey.

Q. Did you recall whether the question was asked Mr. [686] Urban as to why the story concerning this woman beating up Mrs. Cathey had been told?

A. Yes, I do. The story according to Mr. Urban

(Testimony of W. M. Bettis.)

was told because he didn't, Mrs. Cathey or Miss Cathey asked him to tell this story that she had been in a fight with these two women so that if she got arrested it wouldn't be known to her mother that she was working as a prostitute. That was the reason for this particular story.

Q. Do you recall when he said that the story had been told to him?

A. Yes, at 2:15 p.m., on January the 21st, 1955, when she come back to the Alibi Club.

Q. Do you recall whether there was any testimony pertaining to a Mr. Beasley?

A. Yes. Mr. Beasley was called, I think around three to five o'clock on the 22nd.

Mr. Taylor: Just a moment, your Honor, going to object to any testimony as to what Mr. Beasley said. It would be hearsay.

Q. (By Mr. Stevens): This is Mr. Urban's testimony still, what Mr. Urban told the coroner's jury? A. That's right.

The Court: You are not testifying as to what Mr. Beasley said, is that true, Mr. Witness? [687]

Mr. Bettis: No, sir, I am testifying as to what Mr. Urban stated to the jury.

The Court: Objection overruled. You may continue.

Mr. Bettis: Mr. Beasley was called to assist Mr. Urban in taking Mrs. Cathey——

Mr. Taylor: Just a moment, we are going to object to what Mr. Beasley said, your Honor. I think the witness should be admonished.

(Testimony of W. M. Bettis.)

The Court: I believe there is a misunderstanding. You will confine your testimony to what Mr. Urban said, Mr. Bettis. I believe that is what you are doing, but you are not making it very clear.

Mr. Bettis: All right. Mr. Urban called this particular cab driver out to the Alibi Club.

Mr. Taylor: Just a moment. Whose testimony are you quoting now?

Mr. Stevens: I object to this repeated interference with the answer of the witness.

The Court: I think it should be cleared up. The witness started his last statement by saying Mr. Beasley did so and so. If he will make it clear Mr. Urban said.

Mr. Stevens: Mr. Taylor's objection is unfounded. He hasn't said anything Mr. Beasley said yet.

The Court: I think it should be clarified for the sake of the jury and the record. Mr. Urban called Mr. Beasley [688] out, is that the statement?

Mr. Stevens: That is correct, and he is again telling only what Mr. Urban told the coroner's jury.

The Court: That is what I say. It should be made clear, and we wish to have it clear and I am sure you do, Mr. Stevens.

Mr. Stevens: Thank you, your Honor.

Q. (By Mr. Stevens): That is correct, now, Mr. Bettis. You are telling us what Mr. Urban told the coroner's jury in answer to a question?

A. That's right.

Mr. Taylor: What question?

(Testimony of W. M. Bettis.)

Mr. Stevens: I am asking the question, Mr. Bettis. You just finish your answer to me.

Mr. Bettis: I am confused here now.

The Court: Yes, I believe the confusion was well understood. Proceed, Mr. Stevens, by asking a fresh question, maybe the same one.

Q. (By Mr. Stevens): I asked you if you recalled any question or a question being asked Mr. Urban concerning Mr. Beasley? A. Yes.

Q. And now will you tell us what was Mr. Urban's answer to the best of your recollection concerning Mr. Beasley? [689] A. Well——

Mr. Taylor: Just a moment, your Honor, until we find out what question was asked Mr. Urban regarding Mr. Beasley. Now, we don't want this man to go into an oration about something that he don't, if the question that was asked Mr. Urban is not in the record. We can't intelligently object to it, your Honor.

The Court: Yes, but this witness is competent to testify to what Mr. Urban stated at the coroner's inquest.

Mr. Stevens: What the question was that was asked specifically would be hearsay, your Honor, so we have refrained from asking specifically the question because that is not either Mr. Bettis' question or Mr. Urban's statement.

The Court: I would sustain an objection pertaining to a specific question if an objection were made.

(Testimony of W. M. Bettis.)

Q. (By Mr. Stevens): Would you continue your answer, Mr. Bettis, please?

A. Would you repeat that question again?

The Court: Do you wish to have it read?

Mr. Bettis: Yes, I would.

Q. (By Mr. Stevens): Well, I will rephrase it. As a member of the coroner's jury did you hear a question asked Mr. Urban concerning Mr. Beasley or the cab trip that Mr. Beasley purportedly took out to the Alibi Club? [690]

A. Yes, I did.

Q. Which pertained to Myrtle Cathey?

A. Yes.

Q. Would you tell us to the best of your recollection what Mr. Urban told you down there?

A. Mr. Urban stated that on January the 22nd, at around three to five p.m., he called Mr. Beasley to the Alibi Club to assist him in taking Mrs. Cathey to the hospital. And they, after fighting with her for awhile she refused to go.

Q. Did he say who had fought with her?

A. Yes.

Q. And who was that?

A. Mr. Urban and Mr. Beasley.

Q. In answer to a question before the coroner's jury, did you hear Mr. Urban mention the word trick?

A. Yes, I did.

Q. And to the best of your recollection at this time what was that answer that he had given?

A. Well, I believe that word trick was linked with——

Mr. Taylor: Just a moment, Mr. Bettis. We

(Testimony of W. M. Bettis.)

are going to object to a conclusion or an assumption as to what that word meant, your Honor.

The Court: Yes, I believe the witness should show that he remembers what was said, not to surmise. [691]

Q. (By Mr. Stevens): Yes, sir. Would you tell us what you remember at this time, not what you believe, Mr. Bettis?

A. I know Mr. Urban——

Mr. Taylor: Just a moment, Mr. Bettis. Your Honor, I am going to object to this witness saying he knows as to what a particular word means, where he has just said he assumed that such and such. Now he says he knows, but, I think the word only as far as he can go is the words that Mr. Urban used and not what he thought Mr. Urban said or Mr. Urban meant.

The Court: The Court agrees with you, Mr. Taylor, but I don't believe that is what the witness is trying to do. He is attempting to testify to what Mr. Urban said or testified to.

Mr. Taylor: That is just exactly what we want, what he said, not what this witness thought Mr. Urban meant.

The Court: So if Mr. Stevens, if you will first establish from the witness if he remembers what Mr. Urban said at the coroner's inquest concerning a trick, he can go ahead and state what he said concerning a trick.

Q. (By Mr. Stevens): Do you recall at this time what was said concerning a trick?

(Testimony of W. M. Bettis.)

A. Yes, I do.

Q. Would you tell us what you recall, what was said by [692] Mr. Urban?

A. Mr. Urban, at, at the time that Mrs. Cathey, they were attempting to take her to the hospital, Mr. Beasley and Mr. Urban were attempting to take her to the hospital she finally told them she said, I got in a, I have been rolled by a trick, my money has been taken away from me. It is not the first time it has happened. There is nothing I can do about it, and I can settle my own beefs.

Q. Do you recall at this time whether Mr. Urban made any mention of the cab or cab driver?

Mr. Taylor: Just a moment, we are going to have to object to a leading question.

The Court: Overruled.

Q. (By Mr. Stevens): Who had taken Mrs. Cathey and Mr. Urban from the Players Club to the Alibi Club? A. Yes, I do.

Q. Will you tell us the best of your recollection what he said concerning the cab and the cab driver?

A. Mr. Urban testified to the jury that he did not remember the cab, what kind of, which company it was nor did he remember the driver. That was on the, January 21st, in the morning.

Q. Do you recall whether or not Mr. Urban was asked whether he had ever hit or struck Mrs. [693] Cathey? A. Yes, I do.

Q. What to the best of your recollection was his answer?

A. Well, he said no he had never, he had never

(Testimony of W. M. Bettis.)

struck her, he had maybe cuffed her around a few times.

Q. Do you recall whether or not Mr. Urban made a statement pertaining to a pop that he heard in connection with Mrs. Cathey's back or neck?

A. Yes, I do.

Q. What to the best of your recollection was that?

A. Well, that was on January 30th, in the morning. Mrs. Cathey had fallen over a small typing desk, a small table Mr. Urban stated he had walked out of the front of the building and when he came back Mrs. Cathey had fallen over this table and typewriter and she was laying on the floor and he helped her to the, on the bed and as she was laying on the bed she stated she liked to look up at the ceiling and to pull her down so he took her by the feet and as he was pulling her down he said he heard a pop in her neck, a pop he had never heard before.

Q. Do you recall whether Mr. Urban stated whether he had had a conversation with Mrs. Cathey after that, either at the Alibi Club or on the way to the hospital or at the hospital?

A. Yes, I believe, yes, I do.

Q. What to the best of your recollection was that?

Mr. Taylor: Just a moment, your Honor, going to [694] object until the time of that conversation and place is laid.

(Testimony of W. M. Bettis.)

Q. (By Mr. Stevens): Would you tell us where he told you the time and place was?

A. Well, it was on January 30th, 1955, at approximately, at eight, before eight o'clock at the time the Alibi Club, just before the, or after Doctor Anderson had arrived at the Alibi Club.

Q. And what did he say?

A. Mr. Urban stated that Mrs. Cathey had asked him to tell the story that she had been rolled by two women so that if she were arrested she would not, her mother wouldn't find out she was a prostitute.

Mr. Stevens: Thank you, Mr. Bettis. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Are you an officer of the United States, Mr. Bettis? A. Special Agent, Alaska Railroad.

Q. What? A. Department of Interior.

Q. Are you a cop for the railroad?

A. Yes.

Q. You were serving on a coroner's jury, is that right? A. That's right. [695]

Q. And when did you come to Fairbanks this last time you come into Fairbanks?

A. I have been here since 1950.

Q. All the time? A. Yes, sir.

Q. Do you go down the railroad?

A. Yes, sir.

Q. And you have been in town all during this trial?

(Testimony of W. M. Bettis.)

A. I haven't, yes, I have been in the yards here I haven't been over here at all.

Q. Now, you say this is your recollection of what occurred at the coroner's inquest, is that right, Mr. Bettis? A. Yes, sir.

Q. Now, when did you know that you were going to appear here as a witness?

A. Oh, I think yesterday morning.

Q. And did you have any talk about what particular testimony that you were going to give here?

A. I have reviewed the wire tape, yes.

Q. Oh, this is not from your memory then, Mr. Bettis, is that right?

A. Well, I said, I would say it was.

Q. You had access to the wire tape and you come in here and swore before this Court that you were testifying from your memory? [696]

A. Yes.

Q. You are? A. Yes.

Q. So it is not from memory, it is from a tape that is not admissible in evidence here?

A. I refreshed my memory on it, yes.

Q. You refreshed your memory, but you said that you remembered Mr. Urban testifying to certain things and now you say you got it off a wire tape, which is right?

A. I don't understand your—

Q. Well, which is right? You said you was testifying; you have nonchalantly rubbed your chin and well, yes, I recollect, Mr. Urban testifying to

(Testimony of W. M. Bettis.)

certain things, but you remember you heard something on a tape, don't you?

A. Sure, I heard it.

Q. Yeah, so you don't remember what he testified to at the coroner's inquest?

A. I think I do.

Q. Now, if you hadn't had access to this wire tape, Mr. Bettis, would you have been able to come in here and so placidly say, yes, I remember what he said at that time?

A. Oh, chances are I might.

Q. Chances are you might not, too?

A. Yes.

Q. You talk with Mr. Goodfellow and Mr. Wirth since you [697] been in town about this testimony?

A. Well, I work pretty close with those fellows, see them every day.

Q. I am asking you a question, don't be evasive, Mr. Bettis. Just tell us whether or not you talked with Mr. Wirth and Mr. Goodfellow about the testimony you have given this morning?

A. I haven't talked with Mr. Wirth.

Q. Have you talked with Mr. Stevens about it?

A. We have discussed it, sure.

Q. And you had the wire tape you run this off, did you not?

A. That's right.

Q. So your memory then was gotten from a tape that was in the possession of Mr. Stevens. Now, do you remember a man named James Murray testifying at the inquest?

A. James Murray?

Q. Yeah. A. No, I don't.

(Testimony of W. M. Bettis.)

Q. You don't remember. Remember Doctor Anderson?
A. Yes.

Q. O. K. What did Doctor Anderson testify as to when he first went to the Alibi Club?

A. Doctor Anderson testified that he first went to the Alibi Club on June, on January the 22nd at about six p.m. in the evening. [698]

Q. And when was the second time he went there, what did he testify to the second time he went there?

A. January 22nd is the second trip that Doctor Anderson made there.

Q. That is his second trip. When was the third trip?
A. He didn't make a third trip.

Q. So then he testified he went on the 21st and the 22nd, is that right?
A. That's right.

Q. And what treatment did he give between the 22nd and the death of Mrs. Cathey?

A. He stitched up her lip and administered her a shot the night he took her to the hospital.

Q. The night he took her to the hospital?

A. Yes, sir.

Q. And did he prescribe anything for her during the nine days that she was ill?

A. Yes, he prescribed some type of drugs.

Q. Was a lady named Maybelle Bray a witness before the coroner's jury?

A. Maybelle Bray?

Q. Yeah.
A. Yes.

Q. What did she testify to?

(Testimony of W. M. Bettis.)

A. I believe that that is the lady that worked for Mr. Urban. [699]

Q. All right, now, do you remember Rosella McGraw, do you know a lady named Rosella McGraw; did she testify at the coroner's inquest?

A. I don't remember.

Q. Didn't you remember, review that on the tape, Mr. Bettis? A. Certain parts of it.

Q. Just part of it?

A. Certain parts of it.

Q. And do you remember a man named McKenna testifying at the coroner's inquest?

A. Yes, I do.

Q. What did he do?

A. He had very little to say about it.

Q. Who was he?

A. He is a bartender for the Players Club.

Q. And what was his testimony?

A. His testimony, he didn't know anything about it. He seen them and that's all.

Q. Then I asked you one question, if he testified before the coroner's jury why wasn't he called before the grand jury, Mr. Bettis?

Mr. Stevens: I object to that. That is without Mr. Bettis'—

The Court: Sustained. [700]

Mr. Taylor: That's all.

(Testimony of W. M. Bettis.)

Redirect Examination

By Mr. Stevens:

Q. Mr. Bettis, the date business on these two visits of Doctor Anderson, do you recall when Mrs. Cathey died? A. It was on the 31st.

Q. And now, when you recall that, do you recall when the second visit of Doctor Anderson?

A. Yes, it was on the 30th of January.

Q. And then when was the first?

A. On the 21st, 22nd.

Q. 21st or 22nd?

A. January the 22nd at eight o'clock, and January 30th they took her to the hospital.

Q. Is there any reason why you would recall Mr. Urban's testimony more clearly than you would recall these other people that came before the coroner's jury?

Mr. Taylor: We are going to object to that, your Honor, as self-serving.

The Court: He may answer.

Mr. Bettis: Well, yes. The whole, you might say the whole incident took place at the Alibi Club and she, well, I mean, she was living with Mr. Urban. Naturally Mr. Urban was the most important man in the deal.

Mr. Stevens: Your witness, Mr. Taylor. [701]

(Testimony of W. M. Bettis.)

Recross-Examination

By Mr. Taylor:

Q. Wouldn't Doctor Anderson's testimony be quite important, Mr. Bettis?

A. Well, I don't know just what you mean, Mr. Taylor.

Q. Well, you didn't remember Doctor Anderson's testimony?

A. Parts of it.

Q. What?

A. I remembered parts of it.

Q. Very small part of it, wasn't it?

A. There was lots of it I wouldn't understand when I heard him.

Q. And the only reason then that you remembered Mr. Urban's testimony was the fact that it took place at the Alibi Club?

A. Well, Mrs. Cathey——

Q. And you wouldn't have remembered that the death took place on the 31st of January unless Mr. Stevens prompted your memory on the stand here, would you?

A. One-forty-five p.m. at the hospital.

Q. Was you at the hospital at the time of death?

A. No, sir, I wasn't.

Q. And was Doctor Anderson there at the death?

A. Yes, I think he was. [702]

Q. Did he testify that he was?

A. No, I wouldn't testify to it, no.

Mr. Taylor: That's all.

Mr. Stevens: Thank you, Mr. Bettis.

(Witness excused.)

Mr. Stevens: The government rests, your Honor.

Mr. Taylor: May we have the recess, your Honor?

The Court: Yes.

Mr. Taylor: Memorize that whole tape.

Mr. Stevens: I object to Mr. Taylor making such a comment in the hearing of the jury.

The Court: I didn't hear it. I don't know if the jury did or not. I don't know what the comment was. Members of the jury, once more I admonish you not to discuss this case with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning it, the subject of this trial; do not form or express any opinion thereon until the case is finally submitted to you.

I believe you are excused, perhaps about fifteen minutes you are excused now. Do you want a recess, Mr. Taylor, or do you——

Mr. Taylor: What?

The Court: You want a recess at this time?

Mr. Taylor: Yes, your Honor.

The Court: Well, then, we will recess for ten minutes. [703] The jury is excused for fifteen minutes.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:15 a.m., the Court took a recess until 11:25 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: It has been suggested to the Court by counsel for the defendant, and I believe acquiesced in by the government, that the jury in

criminal case 2020 be excused until 1:30 this afternoon and after the Court has excused the jury, the Court will hear any motion that the defendant may wish to make or the government, and the jury will return at 1:30 at which time arguments will commence. Now, as to the limitation of time on the arguments, Mr. Taylor and Mr. Miller, do you have any particular statement in regard to that?

Mr. Taylor: Your Honor, I, heretofore this Court in homicide cases the, no limitation.

The Court: Well, I am thinking, of course, of the jury, too. We start at 1:30. The Court is reluctant to send a jury out to retire on an important case late in the day. It almost means they are apt to be out all night and we don't have adequate facilities for an all night jury. So with that in view the Court would like to limit to a reasonable extent the arguments of counsel. It is highly possible that counsel wouldn't even take up the time the Court might allow, but I think—— [704]

Mr. Taylor: Well, I think, your Honor, an hour and a half to a side would be all right.

The Court: Very well, the Court then will limit the argument to an hour and one-half on each side and the defendant intend to split the argument between the attorneys?

Mr. Taylor: Yes, your Honor.

The Court: That would be an hour and a half or both attorneys?

Mr. Taylor: Yes, your Honor.

The Court: And the same rule will apply to the government.

The Court: The jury might as well be brought

Mr. Stevens: Yes, your Honor.
in at this time and discharged until 1:30. Can counsel think of any reason why we won't be prepared to go ahead at 1:30 for arguments?

Mr. Taylor: No, your Honor, I don't believe so. Not that I know of.

(Thereupon, the jury entered the courtroom.)

The Court: Let the record show the presence of the defendant and his counsel as well as the government attorneys. Do I understand that the defendant rests?

Mr. Miller: Yes, your Honor, the defendant rests.

The Court: Members of the jury, perhaps you think it is strange that I keep admonishing you the same admonishment [705] but that is provided by statute and it is my duty to again admonish you that you shall not discuss the subject matter of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion thereon until the case is finally submitted to you. And I ask that you, please, return to your places at 1:30 this afternoon. The Court has some matters to take up in the absence of the jury and at 1:30 counsel will argue their respective case. So you are excused until 1:30.

(Thereupon, the jury withdrew from the courtroom, and the following proceedings were had out of the presence and hearing of the jury:)

Mr. Taylor: If the Court please——

The Court: Mr. Taylor.

Mr. Taylor: At this time, the defendant, your Honor moves this Court for a judgment of acquittal of the defendant of the crime of murder in the first degree upon the grounds that there has been a total failure of proof of the essential elements of the crime charged, to wit, that the defendant purposely and with deliberate and premeditated malice or in attempting to commit a felony killed Myrtle Cathey. We further move the Court for a judgment of acquittal of the crime of murder in the second degree which is an included crime in the indictment, upon the grounds that there has been a total [706] failure of proof of the essential elements of murder in the second degree, to wit, intent to purposely and maliciously kill Myrtle Cathey. Also move the Court for a judgment of acquittal for the crime of manslaughter which is an included crime in the indictment, which is the unlawful killing of another person upon the grounds that there is a total failure to prove any overt act on the part of this defendant toward the deceased.

(Thereupon, Mr. Taylor presented argument to the Court in support of his motions.)

Mr. Stevens: Mr. Taylor, we renew our request for a copy of this memorandum that you gave the Court.

(Thereupon, Mr. Stevens presented rebuttal argument to the Court in opposition to the motions.)

(Thereupon, Mr. Taylor presented closing argument to the Court in support of his motions.)

The Court: I want Mr. Taylor to know that I have carefully read the cases cited by him and I don't believe that my previous ruling was inconsistent with those cases. I evidently do not get the same meaning from them as Mr. Taylor does and I feel the evidence here makes out a sufficient case to be submitted to the jury and I think it is for the jury to determine what, if any crime has been committed, and the degree. The Court, therefore, denies the defendant's motions at this time. The court will recess until 1:30. [707]

(Thereupon, at 12 noon, a recess was taken until 1:30 p.m.)

Afternoon Session

(The trial of this cause was resumed at 1:30 p.m., pursuant to the noon recess.)

The Court: Gentlemen, are you ready to proceed?

Mr. Taylor: Yes, your Honor.

The Court: Let the record show the presence of the defendant. Parties wish the jury polled?

Mr. Miller: We will stipulate the jury in the box are those that are called to try this case, your Honor.

Mr. Stevens: We will so stipulate.

The Court: Very well.

(Thereupon, Mr. Stevens presented his opening argument to the jury.)

Mr. Miller: If the Court please, could we have the recess at this time?

The Court: Very well. The Court has been in session for an hour so we will take the customary recess and before retiring, members of the jury, once more I admonish you not to discuss the subject of this trial with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; do not form or express any opinion until the case is finally submitted to you. [708]

The Clerk: Court is at recess for ten minutes.

(Thereupon, at 2:30 p.m., the Court took a recess until 2:40 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Let the record show the presence of the defendant and his attorney, Mr. Miller; the government attorneys. Do the parties wish to poll the jury?

Mr. Miller: The defendant will stipulate that the jury in the box, were the jurors called to try this case.

Mr. Stevens: The government will so stipulate.

The Court: Very well, you may proceed.

(Thereupon, Mr. Miller presented his rebuttal argument to the jury.)

(Thereupon, Mr. Taylor presented further rebuttal argument to the jury.)

(During Mr. Taylor's argument the following occurred:)

Mr. Taylor: Mr. Stevens' viewpoint, and it has been touched on by Mr. Miller, but I want you to remember that Doctor Anderson in response to a question on cross-examination, he says that there was not one blow, one bruise on the body of Mrs. Cathey that would cause her death, not one.

Mr. Stevens: I object to those statements, your Honor. I don't think that is in evidence.

The Court: If the jury please, arguments of counsel are not evidence. If the statement is not as you [709] remember the evidence, you will disregard the statement of counsel.

(Mr. Taylor then concluded his rebuttal argument.)

The Court: Mr. Stevens, do you wish to proceed?

Mr. Stevens: I believe I could finish and then take the recess.

The Court: Very well.

(Thereupon, Mr. Stevens presented his closing argument to the jury.)

The Court: Members of the jury, before instructing you in this case we are going to take a ten minute recess so therefore, I again admonish you not to discuss the subject of this trial with anyone; do not permit anyone to discuss it with you; do not listen to any conversation concerning the subject of this trial; and do not form or express any opinion thereon until the case is finally submitted to

you. You will, please, resume your seats in ten minutes.

The Clerk: Court is at recess for ten minutes.

(Thereupon, at 4:35 p.m., the Court took a recess until 4:45 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened. You people who are in the courtroom here, if you don't want to stay through the entire reading of the Judge's instructions you had better get up and go now, because we are not going to let anybody out after [710] the Judge has started to read them, so if you want to go now, why go now, please. They are quite lengthy and might be tiresome to you so we would rather you go now, please.

The Court: Let the record show the presence of the defendant, and his attorney, Warren Taylor; Mr. Stevens, the government attorney.

Mr. Taylor: We will stipulate that the jury are all present, your Honor.

Mr. Stevens: We will so stipulate, your Honor.

The Court: Very well.

(At this time, the Court read the instructions to the jury as follows:)

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is

your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the indictment filed in this court and the defendant's plea of "not guilty." This duty you should perform uninfluenced by pity for the defendant, or by passion, or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for this offense, or because an indictment has been found against him, or because he has [711] been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the United States and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences of such verdict may be. That verdict must express the individual opinion of each juror.

(2) The defendant is charged with murder in the first degree. The indictment in this cause charges that Leon D. Urban, on or about the 31st day of January, 1955, in the Fourth Judicial Division, Dis-

trict of Alaska, then and there being, feloniously killed another, to wit, Myrtle Patricia Cathey, by the said Leon D. Urban having, on or about the 22nd day of January, 1955, purposely, and with deliberate and premeditated malice, feloniously assaulted Myrtle Patricia Cathey by beating her with his fists and other objects, the exact description of which is unknown.

(3) Murder in the first degree is the killing of of a human [712] being purposely and with deliberate and premeditated malice by one of sound memory and discretion.

Thus the elements of the offense of murder in the first degree are four. The first element is the killing, purposely done. The second element is malice. The third element is premeditation. The fourth element is deliberation. Each and all of these elements must be established beyond a reasonable doubt before you may find the defendant guilty of murder in the first degree.

(4) The killing must be purposely done. In other words, it must be done intentionally.

To deliberate means to take into consideration, to ponder and to weigh, although not necessarily prudently or wisely, such reasons for or against a proposed action as come to the mind of a person contemplating the action and whose capacity to exercise judgment has not been destroyed by emotion or passion.

To premeditate a certain action means to think about such action before doing it, so that one reaches a positive decision to take the action and conceives

a plan or a method by which he will undertake to achieve the intended result.

The word "malice," as used in these instructions, is not limited in its meaning to hatred or personal ill will or revenge. The term in its legal definition is much broader. The legal definition of malice is the intentional doing, not [713] the accidental doing, of any wrongful act to the injury of another without legal justification or excuse, and unattended by circumstances which reduce the act to manslaughter. The legal definition comprehends a heart regardless of social duty, a mind bent on mischief, a generally depraved, wicked and malicious spirit.

(5) To constitute murder in the first degree, the killing must be accompanied by a clear, deliberate intent to take life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a heat of passion, or other condition such as precludes the idea of deliberation. The law does not require as an essential element of murder in the first degree, that a prescribed or standardized amount of time be used in the deliberation or elapse between the formation of the intent to kill and the act of killing. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation

and premeditation as will fix an unlawful killing as murder in the first degree.

(6) While the purpose to kill is a state of mind which must be proved as a fact before there may be a conviction of [714] murder in the first degree, proof of such purpose need not be direct, but may be inferred from circumstances attending the killing.

(7) All persons are of sound memory and discretion who are neither idiots nor lunatics nor affected with insanity.

(8) You may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, if, in your judgment, the evidence supports such a verdict under my instructions.

The offense of first degree murder, of which the defendant is charged in the indictment, necessarily includes the crimes of murder in the second degree and manslaughter, and therefore the Court will now instruct you concerning the law of murder in the second degree and manslaughter.

(9) Murder in the second degree must be distinguished not only from murder in the first degree, on the one hand, but from manslaughter on the other. Manslaughter shortly will be defined for you.

Murder in the second degree is the killing of a human being purposely and with malice.

The elements of murder in the second degree are two. The first element is the killing, purposely done. The second element is malice. Both of these elements must be established beyond a reasonable

doubt before you may find the defendant guilty of murder in the second degree. [715]

It is the lack of the elements of premeditation and deliberation which distinguishes murder in the second degree from murder in the first degree.

(10) While the purpose to kill is a state of mind which must be proved as a fact before there may be a conviction of murder in the second degree, proof of such purpose need not be direct, but may be inferred from circumstances attending the killing.

(11) Manslaughter is the unlawful killing of a human being which is not murder in either degree.

Neither malice nor the intent to kill is an essential element of manslaughter. It is the lack of these two elements which distinguishes manslaughter from murder in the second degree.

However, the intent to kill may be present in manslaughter as where the killing, though unlawful, is done in the heat of passion or is the result of a sudden quarrel such as amounts to adequate provocation. In such situations, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such situations even if an intent to kill exists, the law deems that malice, which is an essential element of murder, is absent.

(12) You may not find the defendant guilty of any homicide unless you are also convinced beyond a reasonable doubt that an [716] unlawful act or unlawful acts by the defendant was or were a proximate cause of the death in question.

When a person inflicts upon another an injury

which is dangerous to life or calculated to destroy life, and which does proximately cause the death of that other person, the fact, if it be a fact, that negligence or mistake or lack of skill of an attending physician or surgeon contributes to the death, affords no defense to a charge of homicide.

An injury which proximately causes the death of another is that injury which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the death, and without which the result would not have occurred. The proximate cause is the efficient cause—the one that necessarily sets in operation the factors that accomplish the death.

Provided, however, that if after such an injury was inflicted, the injured one is given grossly improper treatment by another person or persons, which treatment causes the death of the injured person, the original injury shall not be deemed to have been a proximate cause of that death unless it persisted through such treatment as a factor contributing to death and was an actual, contributing factor thereto at the time thereof. If, under this rule, the original injury was not a proximate cause of the death, then the person who inflicted that injury may not be found guilty of any homicide. [717]

(13) When upon the trial of a charge of murder in the first degree the jury is convinced beyond a reasonable doubt that a homicide has been committed by a defendant, but has a reasonable doubt whether such homicide was murder in the first degree or murder in the second degree, the jury must give

to such defendant the benefit of that doubt and bring in a verdict of murder in the second degree. If the jury have a reasonable doubt whether such homicide was murder in the second degree or manslaughter, the jury must bring in a verdict of manslaughter.

(14) The law does not require the defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the prosecution to establish his guilt by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential, substantial part of the law and is binding on you in this case.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the prosecution to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But if, after such impartial [718] comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(15) Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a [719] crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions.

(16) Evidence was offered in this case for the purpose of showing that the defendant committed assaults on Myrtle Patricia Cathey prior to the date of the assault alleged in the indictment.

Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the offense of murder in the first degree or the included offense of murder in the second degree.

You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other in the case.

The value, if any, of such evidence depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime of murder in the first degree, or the included offense of murder in the second degree, as pointed out in other of my [720] instructions.

(17) You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and afterwards was ordered by me to be stricken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any of his questions that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference from it. As to any statement

made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for both parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, either party has admitted a fact to be true, such admission may be considered by you as evidence in the case.

(18) The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. The presumption, however, may be repelled by [721] the manner in which he testified; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony; or by evidence affecting his general reputation for truth, or that his moral character is such as to render him unworthy of belief; a witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial; and by proof that he has been convicted of a crime.

The impeachment of a witness in any of the ways

I have mentioned, does not necessarily mean that his or her testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

Evidence is to be estimated not only by its own [722] intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

(19) The law of this jurisdiction admonishes you to view with caution the testimony of any witness which purports to relate the oral admission of the defendant.

An admission may consist of any statement or other conduct by a defendant whereby he expressl

or impliedly acknowledges a fact that contributes in some degree to the proof of his guilt of a crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.

(20) At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the [723] same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

(21) The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans, or advocates, but rather judges. The final test of the

quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court reminds you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

(22) The prosecution and the defendant both are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that [724] respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion or merely to bring about a unanimous verdict. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

(23) If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to

consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

(24) You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, [725] or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

(25) The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

(26) The law of the Territory of Alaska provides that every person guilty of murder in the first degree shall suffer death or imprisonment at hard labor for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or imprisonment for life. If you should fix the penalty as imprisonment for life, you will so indicate in your verdict by adding thereto "without capital punishment," [726] but if you should fix the penalty as death, you will not specify the death penalty in the verdict, and you will say nothing about punishment in the verdict. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment.

(27) Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. Before you may return a verdict in this case, you must agree unanimously not only as to the innocence or guilt of the defendant, but also, if you should find him guilty of homicide, as to whether the offense was murder in the first degree, murder in the second degree, or manslaughter.

If your verdict is that the defendant is guilty of murder in the first degree your foreman will date and sign Verdict No. I.

If your verdict is that the defendant is not guilty of murder in the first degree but guilty of murder

in the second degree, your foreman will date and sign Verdict No. II.

If you find that the defendant is not guilty of murder in the first degree and not guilty of murder in the second degree but guilty of manslaughter, then your foreman should date and sign Verdict No. III.

If your verdict is that the defendant is not guilty of murder in the first degree, not guilty of murder in the [727] second degree, and not guilty of manslaughter, then your foreman will date and sign Verdict No. IV.

After dating and signing your verdict, you will then return with it to this room.

Dated at Fairbanks, Alaska, this 25th day of May, 1955.

/s/ VERNON D. FORBES,
District Judge.

(At the conclusion of the court reading the instructions to the jury, the following proceedings were had:)

The Court: Counsel approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Taylor: It might be a little bit difficult for me to get mine all out here because there is no numbers, nor are the pages, they are not in the same order as you gave them.

The Court: Well, you may take your time. If you

will recall, the Court gave you gentlemen copies early at your request and said there might be some minor changes, but nothing fundamental unless I informed you.

Mr. Taylor: Yes. Well, I don't know.

The Court: Do you wish to take the originals that are numbered? These are numbered, but you have yours marked, so maybe you would rather refer to your own. [728]

Mr. Taylor: Well, No. 2 I am going to object to that as the fact that it includes the words "other objects" because other objects, no proof of use of other objects. I am going to object also to giving a definition of murder in the first degree as there was no testimony to indicate it was first degree murder.

Then No. 3, I am going to object to instruction No. 3 upon, there is no grounds of the elements, no testimony as to the elements of murder in the first degree.

The Court: I am sorry your copies weren't numbered.

Mr. Taylor: And No. 4, that presumes to be a definition of murder in the second degree and we object to the same upon the grounds that there was no evidence to justify instruction on murder in the second degree and also we object to the failure of the court to give Defendant's Instructions Nos. 1, 2, 3, 4, 5, 6, 7, and 8.

And No. 5, we object to that, your Honor, upon the grounds that it tends to define murder in the first degree and the evidence clearly indicates that such a definition is not justified.

No. 6, we object to No. 6 as there is no definition of what circumstances necessary to convict.

No. 7, I have no objection to that. No. 8, we are going to object to that upon the grounds that there is no evidence of first degree murder and no instruction should be [729] given regarding that.

No. 9. We object upon the grounds no, No. 9, upon the grounds there is no testimony sufficient to submit the question of second degree murder to the jury, also that the court failed to instruct that intent and malice cannot be presumed where fists only are used in the assault which brought about the death of Myrtle Cathey.

We are going to object to No. 10, your Honor, upon the grounds that the, it applies only to second degree and there should be no instruction as to second degree murder.

No. 11 is all right.

Going to object to No. 12 in that the last paragraph on the page it says that giving, if the physician giving improper treatment that brings about the death of the injured party, I think we should put in there, or fails to give the required treatment which he has acknowledged is required, it would absolve the person making the assault of responsibility of death. Failure to act in that case knowing the circumstances would be equal to the guilt of the person charged.

Also No. 13, your Honor, I think on that third line from the bottom that where it says, "the jury must bring in a verdict of "murder in the second degree, I think the word, or acquittal, should be in there and

I think in the last line where it says bring in a verdict of manslaughter, the words or acquittal should be there because the jury would be justified [730] in bringing in either one of those verdicts. In other words, your Honor, the wording of this No. 13 accentuates the guilt and not the innocence.

We are going to object to the, to Instruction No. 15 upon the grounds that that doesn't correctly describe what constitutes circumstantial evidence and the degree or the—strike that, will you, please, and the necessity of the chain of circumstantial evidence leading directly from the crime to the defendant. In other words, it is, the definition as given in Instruction No. 15 is not sufficient.

The words assaults, I am going to object to the use of the word assaults on Myrtle Cathey prior to the date of the assault alleged in the indictment. I believe there is evidence of only one assault, a back-handed slap. We feel that it is, that those, evidence should not have been, that instruction should not have been given upon the reason that the act complained was not part of the *res gestae* nor of the *corpus delicti* and is prejudicial to the defendant as attempting to inflame the minds of the jurors.

No. 18 is O. K. Now, 19. Yeah, that is O. K. Yeah, 20 is all right, 22, that's O. K. Say, I haven't got a Verdict No. IV. Did you get one?

The Court: I think the verdict was changed, the last recess. You perhaps didn't get copies. I think they are all changed. I don't know why you didn't get one. I think you will [731] find that the three you have, I believe, have been changed.

Mr. Stevens: Did you finish, Mr. Taylor?

Mr. Taylor: No, I got one more. I am going to object to the failure of the court to give a definition of circumstantial evidence in the degree of consideration that must be given to it by the jury.

The Court: Is that everything?

Mr. Taylor: That is everything.

Mr. Stevens: We object to Instruction No. 3 for the reason that it does not show the relationship between the elements of premeditation and deliberation as affects malice, and we believe that the statute requires deliberate and premeditated malice and that these two words deliberate and premeditated must be read in reference to the word malice and that state of mind.

We object to Instruction No. 4 for the reason that the meanings, the words emotion or passion as affects the ability to deliberate but does not state what is a legitimate basis for emotion and passion.

We object to Instruction No. 5 on the same grounds the meaning, heat of passion and other conditions as precludes the idea of deliberation but does not give the jury an instruction as to what would be a legitimate basis for the existence of the passion. We also object that it does not include deliberate intent either to take life or to commit [732] greivous bodily harm from which death reasonably and normally would occur and we believe that this instruction tends to confuse by the use of the word deliberate modifying the word intent in the instruction; the difference between the purposely, the

word purposely as used in the instruction and then the malice because it must be deliberate and premeditated malice and not deliberate and premeditated intent although the malice would necessarily include the intent.

Mr. Taylor: You are objecting to the whole instruction?

Mr. Stevens: Yes. We object to Instruction No. 6 on the ground that it does not state fully that both the states of mind necessary for first degree murder may be inferred. It just states that the intent to kill or the purpose to kill, but it fails to state that malice is a state of mind which may be inferred from the circumstances.

We believe that Instruction No. 9, although sufficient, should be elaborated upon because it states that the first element is the killing purposely done. We believe that the statute requires three things, that there be a killing, that it be purposely, and that it be maliciously; and purposely and maliciously both must apply to the killing and setting the second element of malice aside as not being a modification of the killing and might tend to mislead the jury and have them believe that there are only two elements involved in that, but the [733] killing is an element in both degrees but the requirements as to deliberation and premeditation.

We object to Instruction No. 11 because it states that killing though unlawful, when a killing though unlawful is done in the heat of passion or the result of a sudden quarrel such as amounts to adequate provocation, but does not define either passion or

provocation and the jury might be free to decide that provocation which has no substance in law would be an offense sufficient to reduce the crime to manslaughter if it in fact existed. There is evidence here of provocation, that the woman failed to go home, but that would not be a provocation in law and we believe that Instruction No. 12 states the type of clause that should have been included in Instruction No. 5 because it states that when a person inflicts injury upon another, injury which is dangerous to life or calculated to destroy life. That is the type of intent that is necessary in first degree murder. We believe that such a phrase should be placed in Instruction No. 5. The instruction as I say is sufficient although it states "may not find the defendant guilty of any homicide." We believe we have all used the word homicide here, but I am not sure the jury would fully understand that homicide necessarily includes the degrees of crime which are included in the instruction.

The Instruction No. 15, as I understood the stipulation at the time, or not the stipulation but the agreement at [734] the time the evidence of the assault was admitted, it was that the court would instruct the jury that this evidence was received for the limited purpose of establishing a state of mind and as the instruction reads, it reads it is admissible on the question of whether the defendant is innocent or guilty in the murder of first degree or an included offense of murder in the second degree. It is not objectionable to me on that part, but I wish to state that it doesn't comply with what I thought would be

the instruction in view of the agreement of counsel and also I believe that the evidence of the previous assault would be admissible in regard to the issue of manslaughter in order to determine whether the crime was unlawful and also whether it was purposely done. Not purposely in the sense of the statute, but intentionally as against negligently.

In connection with Instruction No. 18, I wish to point out to the court and counsel that I probably got a little excited in my closing argument and I mentioned the ruling upon the court which was error and which I would like to have the court instruct the jury that they should disregard. I commented on the fact that hearsay statements of the government's witness were not admitted, but the hearsay statements of the defendant's witnesses were admitted. I apologize to the court and ask that the court instruct the jury that they should disregard that if they are able to do so.

We object to the court's failure to give government's [735] Instruction No. 3 on the ground that further elaboration of the word intentionally is necessary in order to show that there is a specific intent required in this case before the defendant can be convicted of first degree murder. The court has said purposely means intentionally as we did in our Instruction No. 3, but the jury having heard the word intent before in connection with criminal cases might be led to believe that that is just a normal criminal state of mind whereas a specific degree of intent is necessary in this case.

Also we do not believe that the case of *Johnson v.*

United States, the 9th Circuit opinion which was more or less the guide in connection with the meaning of deliberated and premeditated has been adequately complied with and that was covered in our Instruction No. 3.

We object to the court's failure to give our requested Instruction No. 4 on the ground that we believe that in view of the courts' instructions and the failure to give the instruction that ordinarily blows with a fist alone may not raise an inference of malice, that the jury might return a verdict of first degree murder and the requirements set forth in *McAndrews v. People* and the cases following that leading case would not be met. The jury should be instructed that it is not a normal case where death resulting from an attack will permit the inference of either intent to kill or malice; but there is a possibility that such a situation could exist and it [736] would depend upon very extreme circumstances, a person physically weak being attacked by a person in physically good condition or something to that effect, and we object to the court's failure to give our Instruction 5(a) which was a further explanation of the items which may be considered in connection with the question of whether or not the facts before this court and jury would justify a first degree murder conviction, but that without a guide set forth by the court in order to show them that it would be a very extreme case where this would be necessary, the jury is not adequately advised as to what their consideration should be concerning first and second degrees of murder.

The Court: Are you through, Mr. Stevens?

Mr. Stevens: Yes, sir.

The Court: In view of the exceptions taken by both the defendant and the government and in view of the hour, it being twenty minutes of six, I don't feel that I can properly permit the jury to retire.

Mr. Taylor: That is just what I was thinking of.

Mr. Stevens: Could you send them out to dinner and then amend your instructions, if the court so desires, and give it back to them after dinner. It is approximately dinnertime now. By the time they finish it would be eight o'clock. I would hesitate to allow the jury to go home and be separated now in view of the fact that an article has been written in [737] the newspaper now and there will be radio comments and other things which might now affect their decision and will be bad for both the defendant and the government. What would you think of that, Mr. Taylor?

Mr. Taylor: Well, I don't think it would be too good an idea, but I don't think, I think the court would surely like to study these objections and exceptions that we have taken to these instructions. Let them go to dinner. I don't know how long it would take to go over these. Of course, again there is a possibility that you might want to change some of them. I don't think that there would be any serious objections to letting them go home if they go straight home.

The Court: There is no way of knowing, of course, you have to put a jury on their trust, you

have to when you select them so I think that—it is a little unusual but otherwise it is going to work quite a hardship on them the way it is.

Mr. Stevens: Well, if Mr. Taylor would have no objection, the government would have no objection as far as any procedure the court wants to follow. It is up to him.

Mr. Taylor: I say I am not in favor of it but I think the circumstances are such, I would trust them enough to let them go.

The Court: Are you agreeable to have them come back at nine o'clock tomorrow morning? [738]

Mr. Taylor: I think you want to impress upon them that this is a very unusual position.

Mr. Stevens: I would also like to have the court caution them as to my comments at this time because it might be more impressed upon their minds if it was done now rather than in the morning.

The Court: I am afraid, Mr. Stevens, the more I comment on that the least good I will accomplish.

Mr. Stevens: Well, I don't know whether it would or not. And I am not sure that it is erroneous, but it was pointed out to me that it may be so if that is the case why——

The Court: Well, with the defendant consenting I will have the jury report here at perhaps nine-thirty tomorrow morning.

Mr. Taylor: That is all right. For further instructions.

The Court: Very well.

(Thereupon, the attorneys withdrew from

the bench and the following proceedings were had in the hearing of the jury:)

The Court: Members of the jury, in view of a situation that has arisen it seems that you will not be sent out to commence your deliberations and the defendant has consented and the government has consented that you come back at nine-thirty tomorrow morning at which time you may be given [739] further instructions, and sent out to deliberate.

Now, I wish to again call your attention to the fact that this is an important case and this is perhaps an unusual procedure so I once more admonish you to be certain not to discuss the subject of this trial with anyone; do not permit anyone to discuss it with you; and do not listen to any conversation concerning the subject of the trial; and do not form or express any opinion thereon until the case is finally submitted to you. And will you, please, return to your places at nine-thirty tomorrow morning.

The Clerk: Court is adjourned until nine-thirty tomorrow morning.

(Thereupon, at 5:45 p.m., the trial of this cause was adjourned until May 26, 1955, at 9:30 a.m.)

* * *

May 26, 1955—9:30 A.M.

Be It Remembered, that upon the 26th day of May, 1955, at the hour of 9:30 a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel; the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Let the record show the presence of Mr. Urban and his counsel. Will the Clerk, please, call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present except Mr. Hutchinson, your Honor. [740]

The Court: In regard to juror Hutchinson, my law clerk received a call at eight o'clock this morning that Mr. Hutchinson was desperately ill. I was told that he was ill yesterday, but I don't know whether the parties wish to wait the certificate of a doctor, attending physician. He was not excused by the court but some woman called in, talked to my law clerk and said Mr. Hutchinson was unable to be here because of illness. If required by the defendant the court will insist that proof of the condition of Mr. Hutchinson be furnished before proceeding further.

Mr. Taylor: If the Court please, if Mr. Hutchinson has requested to be excused and has a valid excuse, I think we would have no objection to having the first alternate sit as a juror.

The Court: Just to make the situation clear, Mr. Taylor, Mr. Hutchinson did not request the

court to be excused and he was not excused by the court. He was not excused but merely a report came to the building by telephone that he was unable to be here because of illness and I have not excused him. But I assume that he is not deceiving the court.

Mr. Taylor: Your Honor, I think for the record if anything came up in the future about this case it might be better to have a certificate from the doctor or other evidence to convince us that he is actually ill, and if that is the case, why I would certainly agree to the first alternate to sit. [741] I think the record should show, I believe myself that he possibly is sick.

The Court: As I understand, he lives out on the Badger Road which is quite a distance. Mr. Hayden.

Mr. Hayden: Your Honor, he lives about fourteen miles from town, out on the Badger Road.

Mr. Taylor: Well, under those circumstances, your Honor, I certainly consent on the part of the defendant for him to be excused and the first alternate serve in his place.

The Court: And Mr. Stevens?

Mr. Stevens: No objection, your Honor. We believe that is the best procedure.

The Court: Very well, Mr. Clerk, who was the first alternate?

The Clerk: Your Honor, I will have to get my sheet. You were the first one. Mr. Baker they say.

Mr. Taylor: Mr. Baker is first and Mr. Erickson is second.

The Court: Do the parties stipulate that Mr.

Baker is the first alternate and stipulate that he shall take the place of the juror Hutchinson?

Mr. Taylor: The defendant so stipulates.

Mr. Stevens: The government so stipulates.

The Court: Very well. Mr. Baker, will you, please, take the empty chair. Are the parties ready to proceed? [742]

Mr. Stevens: Yes, your Honor.

The Court: Is the defendant ready?

Mr. Miller: The defendant is ready, your Honor.

Mr. Taylor: I believe we should approach the bench first, your Honor.

The Court: Very well.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Taylor: This is merely to keep the record straight. I think that both Mr. Stevens and I excepted certain instructions by the court and also excepted to the failure of the court to give certain requested instructions for both the defendant and the plaintiff and I don't believe that the court now has either, has overruled our objections or exceptions to any of it that was given by either the plaintiff or the defendant. I think the court should rule on those before we proceed.

The Court: Very well then, the Court will deny the exceptions of the defendant and the government.

Mr. Stevens: Just a minute. Your Honor, in that state of the record then I request the Court to direct a judgment of acquittal on the charge of

the indictment, first degree murder and submit only the second degree and manslaughter charges to the jury on the ground that under the court's [743] instructions conviction of first degree murder could not be upheld.

The Court: Well, you consent to an oral instruction?

Mr. Taylor: We are going to object to anything like that.

Mr. Miller: Why?

Mr. Taylor: It comes too late.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:)

Mr. Miller: If the Court please, we will withdraw that objection, that last objection.

The Court: Will counsel then approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Should we then take a recess and prepare a written instruction or will you be satisfied if I orally in court inform the jury that they will not be permitted to return a verdict of guilty of murder in the first degree.

Mr. Taylor: Well, I think a written instruction would be better, your Honor, but I also am going to make a motion at this time, too, that the court dismiss the charge of second degree murder in-

cluded in the indictment upon the grounds that the homicide, if any was committed on the first; there was [744] no intent or malice which are essential to the crime of second degree.

Mr. Stevens: We would resist that motion. We believe that a second degree conviction could be upheld but we do not believe that unless the proper instruction is given concerning the fact that death cannot normally result from a blow of the fist and that an assault with fists alone or similar objects would not normally lead to a case in which a first degree murder verdict could be returned, that we could not uphold the first degree murder conviction if the jury did return it. However, we do believe under the court's instructions as to second degree murder we could uphold that.

The Court: Of course, gentlemen, the court feels that under the instructions a verdict of guilty of the crime of first degree murder could and would be upheld but in view of the motion made by the government I am willing at this time to instruct the jury that they will not be permitted to bring in a verdict of guilty of murder in the first degree.

Mr. Stevens: Well, they are your Honor's instructions. We only have our feelings about them. If you feel that the case should go to the jury as it is why that, of course, is your Honor's decision.

The Court: Yes, but as I say I believe that the instructions are proper and that the, they would uphold a conviction of murder in the first degree, but if the government [745] moves that I instruct the jury that they shall not bring in a verdict of

murder in the first degree and that motion is not resisted by the defendant, I will certainly give it.

Mr. Miller: Well, it is not resisted by the defendant.

The Court: And the only question in the Court's mind is whether now I will be permitted to give it orally if the government wishes it.

Mr. Taylor: I think it should be in writing, your Honor, because if they convicted on second degree or manslaughter, went to the Circuit Court we should have an instruction on that.

Mr. Stevens: If the Court would give an instruction that ordinarily blows by the fist alone would not cause death and it must be an extreme case before first degree murder would result from attack, the government would withdraw the motion. As we understand the authorities, such a cautionary instruction is an absolute must before a first degree murder verdict could be upheld. And I, I hope the Court realizes I am being respectful in this, but it is just that although I don't anticipate a first degree murder verdict in this case, if it should come in we would like to have the situation where we would feel confident on appeal.

The Court: Well, I certainly, Mr. Stevens, don't take your remarks in any personal way and, of course, I had [746] almost a sleepless night over this situation and I know that everybody in good faith and I feel that the matter of fists, how the act was done, if it was done, is a question for the jury and I believe that the appeal courts have examined the record and they have certainly in their

decisions have made comments concerning how and when first degree might be made out in cases, but I don't find anything that makes that a part of the instructions to the jury. That is an examination of the record to determine in each case under the facts of this, even whether or not first degree murder has been made out. But, Mr. Taylor, to expedite matters, if I instruct the jury that they will not be permitted to bring in a verdict of guilty of murder in the first degree orally will that be satisfactory. It will be on the record.

Mr. Miller: Let's do it on that. That will be right here in the record.

The Court: And that is what you wish, Mr. Stevens, under the circumstances?

Mr. Stevens: Yes, your Honor.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury:)

The Court: Ladies and gentlemen of the jury, the Court instructed you fully last evening and the instructions as read to you by the Court will accompany you to the jury room. [747] I have an additional instruction for you this morning in writing which I shall read to you.

(At this time, the Court read its additional instruction to the jury as follows:)

ADDITIONAL INSTRUCTIONS
TO THE JURY

Ladies and Gentlemen of the Jury:

I further instruct you:

(1) Homicide is the killing of one human being by another.

Dated at Fairbanks, Alaska, this 26th day of May, 1955.

/s/ VERNON D. FORBES,
District Judge.

(At the conclusion of the court reading the additional instruction to the jury, the following proceedings were had:)

The Court: That instruction will also accompany you into the jury room. And at this time I further instruct you and orally and there will be no written instruction following you to the room, that you will not be permitted to bring in a verdict of guilty of murder in the first degree.

Mr. Miller: With the Court's permission, could I request that the Court withdraw the first verdict from the——

The Court: No objection to that, Mr. [748] Stevens?

Mr. Stevens: I believe that would be proper, your Honor.

The Court: Very well. I referred to four verdicts in my instructions and am now withdrawing Verdict No. 1. At this time, Mr. Erickson, the

Court wishes to thank you for your service in the case, but you are now excused from further duty and it would be well if he can report at ten o'clock.

The Clerk will qualify the bailiffs.

(Thereupon, the Clerk of Court proceeded to qualify the bailiffs.)

The Court: Is there any objection to the retirement of the twelve jurors at this time? The jury may retire for deliberations.

(At 9:50 a.m., the jury, in charge of its sworn bailiffs, retired to enter upon its [749] deliberations.)

United States of America,
Territory of Alaska—ss.

I, Mary F. Templeton, Official Court Reporter for the District Court, District of Alaska, Fourth Judicial Division, Fairbanks, Alaska, do hereby certify as follows:

That I was the official court reporter for the above-named Court on May 16, 17, 18, 19, 20, 23, 24, 25, and 26, 1955, the dates upon which the cause of United States of America v. Leon D. Urban was heard;

That I recorded in shorthand all of the oral proceedings had in open court upon said dates;

That the foregoing pages, numbered 1 through 749, both inclusive, are a full, true, complete and

accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 8th day of September, 1955.

/s/ MARY F. TEMPLETON,
Official Court Reporter.

Subscribed and sworn to before me this 8th day of September, 1955.

[Seal] /s/ OLGA T. STEGER,
Chief Deputy,
Clerk of the Court.

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list of proceedings in this cause comprises all proceedings listed by the defendant and appellant in his Designation of Record on Appeal, viz:

- 1—Indictment.
- 2—Verdict.
- 3—Sentence.
- 4—Judgment and Commitment.
- 5—Affidavit in Support for Order Extending Time.
- 6—Order Extending Time to File Record and Docket Cause.

- 7—Order Extending Time to File Record and Docket Cause.
 - 8—Notice of Appeal.
 - 9—Undertaking on Appeal on Admission to Bail.
 - 10—Order Admitting Defendant to Bail.
 - 11—Motion for New Trial.
 - 12—Hearing and Denial of Motion for New Trial.
 - 13—Instructions to the Jury.
 - 14—Defendant's Requested Instructions.
 - 15—Praecipe for Transcript of Record on Appeal.
- Transcript of proceedings at trial, separately bound, pages 1 to 750, inclusive.
- Exhibits under separate cover by parcel post.

Witness my hand and the seal of the above-entitled Court this 23rd day of September, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14883. United States Court of Appeals for the Ninth Circuit. Leon D. Urban, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed September 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,883

LEON D. URBAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Appellant herein states that the points upon which he intends to rely on this appeal are as follows:

1. The error of the trial court in denying defendant's motion for acquittal at the close of the plaintiff's evidence and at the close of all the evidence.

2. The error of the court in denying defendant's motion for a new trial.

3. The error of the court in ruling that the verdict was supported by the weight of evidence and overruling appellant's contention that there was no substantial evidence to support the verdict of guilty.

4. The error of the court in overruling the objection of counsel for defendant to the statement made by the United States Attorney in his argument to the jury that the District Judge had deprived him of the opportunity of introducing hear-

say testimony in evidence and had allowed the defense attorneys to introduce such testimony in evidence.

5. The error of the court in admitting in evidence the enlarged pictures of the body of deceased, Myrtle Cathey, which enlargements were distorted, over the objection of the attorneys for defendant.

6. The error of the court in refusing to instruct the jury regarding the law of circumstantial evidence at the request of the attorneys for the defendant.

7. The error of the court in refusing to give defendant's requested instructions and failing to instruct the jury upon the elements of involuntary manslaughter or excusable homicide.

8. The error of the court in giving Instruction No. 12 for the reason that the second paragraph thereof assumes that the defendant inflicted upon the deceased injuries by means of which were dangerous to life and calculated to destroy life, and in the 4th paragraph of said instruction failed to instruct the jury that where there is a failure to give the required treatment to an injured person where such treatment would save the life of said injured person, such failure to treat the injured party was a contributing cause of death.

9. The error of the court in giving Instruction No. 16 upon the grounds that the same was not based upon competent evidence.

10. The error of the court in allowing the jury to separate and go to their respective homes for the night after the jury had been instructed by the court and the case was not submitted to them for deliberation until the following morning.

/s/ WARRAN A. TAYLOR,

/s/ JULIAN A. HURLEY,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 3, 1955.

No. 14,883

IN THE

United States Court of Appeals
For the Ninth Circuit

LEON D. URBAN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF OF APPELLANT.

WARREN A. TAYLOR,

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorneys for Appellant.

FILED

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VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF OF APPELLANT.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of conviction of manslaughter of the District Court for the District of Alaska, Fourth Division, under which appellant was given the maximum penalty of twenty years imprisonment.

The jurisdiction of the District Court to try this case is conferred by Title 48 U.S.C.A. Section 101, establishing a district court for the District of Alaska, with general jurisdiction of this Court as set out in 28 U.S.C. Sections 1291 and 1294.

STATEMENT OF POINTS RELIED UPON.

(1) The District Court erred in denying defendant's motion for an acquittal at the close of plaintiff's evidence and at the close of all the evidence.

(2) The District Court erred in admitting in evidence the enlarged pictures of the body of the deceased, Myrtle Patricia Cathey, which enlargements were distorted, over the objection of the attorneys for defendant.

(3) The District Court erred in refusing to instruct the jury regarding the law of circumstantial evidence at the request of the attorneys for defendant.

STATEMENT OF THE CASE.

The appellant, Leon D. Urban, was indicted for murder in the first degree in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949. The indictment charges that appellant, on the 22nd day of January, 1955, purposely, and with deliberate and premeditated malice, feloniously assaulted Myrtle Patricia Cathey by beating her with his fist and other objects, the exact description of which were unknown, and that she died on or about the 31st day of January, 1955.

The only evidence produced by the Government of an assault by appellant upon Myrtle Patricia Cathey, on the 22nd day of January, 1955, was the testimony of a cab driver by the name of Marvin T. Jennings (Tr. 189, 194, 208, 217, 219). He testified

that he heard appellant slap or strike deceased but that he did not see him slap her (Tr. 200). He was driving appellant and the deceased in a cab from the Players Club in Fairbanks to the Alibi Club in Fairbanks. The Alibi Club was a saloon operated by appellant and the deceased Myrtle Patricia Cathey and the Players Club was also a saloon in Fairbanks, Alaska. The Alibi Club is located about seven or eight tenths of a mile from the Players Club. The said Marvin T. Jennings testified that when he arrived at the Alibi Club with the two passengers, the appellant got out of the car and went to the door of the Alibi Club and unlocked and opened the door and returned to the cab and dragged the deceased from the cab, a distance of ten or fifteen feet, by the hair of her head. According to the testimony of Dr. Harvey W. Anderson (Tr. 38, 62, 68, 90, 112, 99, 115), when he examined the deceased on the 22nd day of January, 1955, he found no evidence that she had been dragged by the hair of her head ten or fifteen feet from the car to the Alibi Club. According to the testimony of Dr. Henry Storres (Tr. 569, 573, 577) and the testimony of Dr. Paul B. Haggland (Tr. 630, 632, 637), there would undoubtedly have been some evidence in regard to the condition of the scalp of the deceased if the testimony of the said Marvin T. Jennings were true. When the witness, Marvin T. Jennings, was cross-examined he said that he had never hauled the deceased in his cab but the one time and denied that he ever took her to the Bluebird. The Bluebird was also another saloon in the town of Fairbanks, Alaska. This testimony was in direct conflict

with the testimony of Bill Anders (Tr. 578, 584, 588, 589). Dr. Anderson, in his testimony, testified that he could not, from an examination of the wounds on the head of deceased, tell whether or not any type of instrument was used to inflict the wounds. He was also allowed to testify that he believed the mouth lacerations could be well explained by a fist. An attempt was made by appellee to show that appellant was guilty of criminal negligence and evidence was introduced for that purpose (Tr. 63, 64, 65). Dr. Anderson testified that he was called by Mr. Urban about eight-thirty o'clock on the evening of the 30th day of January, 1955, to see the deceased because she showed signs of becoming critically ill. That he examined her and advised that she be sent to the hospital which was done and she arrived in the hospital about nine-thirty o'clock on the evening of January 30, 1955. According to the testimony of the doctor, he knew the proper operation to perform to relieve the pressure on the brain of deceased and although he was sent for several times he did not appear at the hospital until after her death on the early morning of January 31, 1955. In his testimony he further stated that he would have been able to aid the deceased if he had seen her the day after she received the injuries. The doctor also testified that none of the bruises on her legs or body had anything to do with the cause of her death. The doctor also stated that the hemorrhage causing the death of the deceased could have been a spontaneous hemorrhage (Tr. 94).

Dr. Harvey W. Anderson never testified, after stating that he knew the proper operation to perform,

what the effect would have been if he had operated on the deceased after he ordered her to be sent to the hospital. He testified that the cause of her death was due to pressure on her brain and that the pressure could have been relieved by the proper operation and the natural conclusion is that the appellant should not be blamed and held responsible for the failure of the doctor to perform the operation he knew was necessary in order to save her life.

ARGUMENT.

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR AN ACQUITTAL AT THE CLOSE OF PLAINTIFF'S EVIDENCE AND AT THE CLOSE OF ALL THE EVIDENCE.

As stated in the statement of the case, the only evidence of an assault by appellant on Myrtle Patricia Cathey, on the 22nd day of January, 1955, was a cab driver by the name of Marvin T. Jennings. There was also the testimony of Frank Meyers, a witness called by appellee (Tr. 234-257), whose testimony was admitted over the objection of the attorneys for appellant. Before the objection, the witness testified as follows (Tr. 235-236):

“Q. When is the last time that you went there that you remember?

A. Oh, shortly after New Year's.

Q. Of this year, 1955?

A. Yes.

Q. Who was there at that time?

A. Mr. Urban and Myrtle.

Q. What time was that?

A. Oh, about nine o'clock.

Q. In the evening or in the morning?

A. Evening.

Q. Was there anyone else there at that time?

A. One other man.

Q. What did you do there?

A. I sat at the bar and bought a drink.

Q. Where was Myrtle Cathey?

A. She was at the bar.

Q. Where was Mr. Urban at that time?

A. Well, at that time he was out somewheres.

I don't know where.

Q. Did he come into the bar at all?

A. Yes.

Q. Where were you when he came in?

A. Sitting at the bar with Myrtle.

Q. Did you see what Mr. Urban did when he came in?

A. He sat down aside of Myrtle at the bar."

After the objection and considerable argument by counsel the witness Meyers was permitted to testify as follows (Tr. 251-252):

"By Mr. Stevens. Q. Now, Mr. Meyers, if you recall that occasion, what happened, if anything, after that?

A. Well, they got in an argument and he backhanded her one.

Q. And what happened at that time?

A. Well, then she fell off the stool. In a minute or two she got up and sat on the other side of him.

Q. How long were you there at that time?

A. About fifteen minutes, thirty minutes.

Q. Did you hear the argument?

A. No, paid no attention to it.

Q. Did you observe where Miss Cathey fell?

A. Well, she fell back behind me and she must have hit her head on the bowling machine."

The Court attempted to limit the application of this evidence in his instruction number sixteen saying that assaults on Myrtle Patricia Cathey prior to the date of the assault alleged in the indictment was received for a limited purpose (Tr. 670). This instruction was excepted to by the attorneys for appellant (Tr. 608) for the reason that there was only one assault prior to January 22, 1955, but the real effect of the evidence was to prejudice the jury against the appellant and tend to corroborate the testimony of the witness Marvin T. Jennings.

All the evidence which tended to show in any way that appellant inflicted wounds upon the deceased which resulted in her death was purely circumstantial evidence and the jury should not have been permitted to draw the conclusion that appellant was guilty of manslaughter. The witness Marvin T. Jennings was not certain as to what happened in his car (Tr. 200).

"Q. Is there any way that you can be positive that it was due to a blow that she went over against the door?

A. He either slapped her or hit her, I don't know which.

Q. But you didn't see any of it?

A. No, sir.

Q. You, from the sounds that is what you are going by?

A. Yes, sir.

Q. And you can't tell by the sound exactly what force was used, is that correct?

A. That is correct.

Q. If he was using his open hand it would make a lot more noise than his fist, is that true?

A. Yes, sir."

Dr. Harvey W. Anderson was not certain as to the cause of death. He testified that the bruise between the shoulder blades of deceased was caused by a large object (Tr. 52).

"Q. And from your observation of the body could you tell us whether or not it was a large or small object?

A. Well, the one bruise was seven inches across, the one behind, between the shoulder blades. That was the largest bruise she had, that would have to be the largest object."

He also testified as follows (Tr. 55):

"Q. You have described the cause of death as being subdural hematoma?

A. Yes.

Q. What would that have been?

A. Spontaneous subarachnoid hemorrhage occasionally occurs."

He also testified as follows (Tr. 75):

"Q. And then you took some stitches in the lip?

A. Yes.

Q. And the lower lip, isn't it a fact, Doctor, you had to pull it, kind of expose it, to make those stitches?

A. Slightly.

Q. How many stitches did you put in the lower lip?

A. I don't recall exactly.

Q. How many in the upper?

A. I don't recall either location. Several.

Q. Well, Doctor, would those injuries to the lips be of such a nature that they might cause death?

A. No.

Q. Call them more or less superficial wounds or contusions?

A. I would."

He also testified as follows (Tr. 85):

"Q. In your experience, Doctor, have you ever had a case where there was an instantaneous breaking of blood vessels in the brain causing instant death, cerebral hemorrhage?

A. I haven't had a patient who died, but I have had many, not many but, oh, perhaps three or four patients who have had spontaneous brain hemorrhages. None of these happened to die. The mortality figure on such cases are high, however."

He also testified as follows (Tr. 49-50):

"Q. (By Mr. Stevens) Well, by examining the wounds alone, Doctor, could you tell us whether or not any type of instrument was used to inflict those wounds?

A. Well, an instrument such as a knife, of course, would leave a cut. There were no such wounds as that.

Mr. Taylor. Just a moment, I am going to object. I think the answer calls for a yes or no.

The Court. I will strike the answer of the witness.

Dr. Anderson. The question was, did I think—
 The Court. Maybe it should be read, Doctor.
 (Thereupon, the reporter read the question.)
 Dr. Anderson. No.”

Certain exhibits, numbers one to six, inclusively, were admitted in evidence over the objections of attorneys for appellant and the admission of all these exhibits was prejudicial and they were not legally admissible.

In a case of this kind, where the prosecution relies almost entirely upon circumstantial evidence for a conviction, the evidence must not only be consistent with guilt but inconsistent with innocence (*Karn v. United States*, 158 F. 2d 568; Wharton's Criminal Evidence, Vol. 2, Sec. 922, p. 1603).

THE DISTRICT COURT ERRED IN ADMITTING IN EVIDENCE THE ENLARGED PICTURES OF THE BODY OF THE DECEASED, MYRTLE PATRICIA CATHEY, WHICH ENLARGEMENTS WERE DISTORTED, OVER THE OBJECTION OF THE ATTORNEYS FOR DEFENDANT.

These exhibits, Government identification numbers one to six, inclusive, were all offered and introduced at the same time, over the objection of the attorneys for appellant (Tr. 135). Part of the pictures were of the head of deceased and part were of the body. The bruises on the body shown in the pictures, and on the lips of the deceased, according to the testimony of Dr. Anderson, had nothing whatever to do with causing the death of deceased and the only purpose which they could serve would be to inflame the minds

of the jurors and prejudice them against the appellant (*State v. Miller*, 43 Ore. 325, 74 Pac. 658; *State v. McKay*, 132 N.W. 741-746).

The bruises on the lips of the deceased and the bruises on her body had nothing whatever to do with the death of deceased and there is no evidence of any kind, tending to show that appellant caused the bruises upon the body of the deceased. In fact, for the jury to find that appellant caused any bruises found upon the head of deceased must be based upon suspicions, probabilities, and suppositions, which do not warrant a conviction (Wharton's Criminal Evidence, Vol. 2, p. 1605).

We are all familiar with the most recent cases in Oregon and in most of the States, as well as in the Federal Court, that pictures, even though gruesome, are admissible in evidence when they show the wounds which caused death, and the Oregon case has never been reversed to the extent that such pictures are admissible, for any purpose, when they do not show the wounds that caused the death of the deceased or where there is not sufficient evidence to connect the accused with inflicting the wounds.

THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY REGARDING THE LAW OF CIRCUMSTANTIAL EVIDENCE AT THE REQUEST OF THE ATTORNEYS FOR DEFENDANT.

The only instruction given by the Court in which circumstantial evidence is mentioned is instruction number 15, which reads as follows (Tr. 669):

“(15) Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions.”

Exception to the instruction was taken by the attorneys for appellant (Tr. 680, 681) as follows:

(Tr. 680) “We are going to object to the, to Instruction No. 15 upon the grounds that that doesn’t correctly describe what constitutes circumstantial evidence and the degree or the—strike that, will you, please, and the necessity of the chain of circumstantial evidence leading directly from the crime to the defendant. In other

words, it is, the definition as given in Instruction No. 15 is not sufficient.”

(Tr. 681) “Mr. Taylor. No, I got one more. I am going to object to the failure of the Court to give a definition of circumstantial evidence in the degree of consideration that must be given to it by the jury.

The Court. Is that everything?

Mr. Taylor. That is everything.”

We are familiar with the case of *Holland v. United States*, in Volume 348 U.S., page 121, in which is stated, on pages 139 and 140, as follows:

“The petitioners assail the refusal of the trial judge to instruct that where the Government’s evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, *Garst v. United States*, 180 F. 339, 343; *Anderson v. United States*, 30 F. 2d 485, 487; *Stutz v. United States*, 47 F. 2d 1029, 1030; *Hanson v. United States*, 208 F. 2d 914, 916, but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. *United States v. Austin-Bagley Corp.*, 31 F. 2d 229, 234, cert. denied, 279 U.S. 863; *United States v. Becker*, 62 F. 2d 1007, 1010; 1 Wigmore, *Evidence* (3d ed.), §§25-26.”

Examining the opinion of the United States Court of Appeals for the Tenth Circuit in the same case of *Holland v. United States* in 209 F. 2d 516, in paragraphs 14 and 15, page 523, we find the following:

“The jury was repeatedly admonished that the government’s case was based upon circumstantial evidence and that before they could convict the appellants, they must believe that evidence beyond a reasonable doubt. In that connection, they were told to use their common sense in determining what inferences might reasonably be drawn from the circumstances which they thought were established by the proof. While circumstantial evidence was not defined in time-honored terms that it must be consistent with guilt and inconsistent with any other hypothesis, we do not think the court left any doubt in the minds of the jury of the nature of the proof or how it should act upon it.”

In this case there was no instruction of any kind, or nothing said, in regard to circumstantial evidence, except as stated in said Instruction No. 15. The rule has been followed by practically all the state courts and all the federal courts for many years that circumstantial evidence must be consistent with guilt and inconsistent with any reasonable hypothesis and it is our contention that the appellant, where all the evidence was circumstantial, was entitled to the protection of an adequate instruction in regard to the law of circumstantial evidence.

It seemed to be the opinion of the District Court that the decision in the Supreme Court in the *Holland* case made it absolutely unnecessary for the trial court to give any instruction in regard to the law of circumstantial evidence. Under that instruction the jury had a right to believe that everything that was

admitted in evidence and all of the testimony, purely circumstantial, indicated that the defendant was guilty. Notwithstanding the opinion of the trial court that there was sufficient evidence to warrant a conviction of murder in the first degree, the jury returned a verdict of manslaughter. We do not believe that the Supreme Court of the United States intended that when a murder case is based solely on circumstantial evidence, that the defendant is not entitled to the required instruction, which has always been followed by all of the courts, that said evidence must be consistent with guilt and inconsistent with innocence.

In this case the jury, under the instructions of the Court, and the admission of testimony over the objection of the attorneys for appellant, and principally upon the testimony of the witness Mr. Meyers of an assault shortly after the 1st of January, 1955, felt that appellant was guilty of assault and battery and that in some manner he should be punished, hence the verdict of guilty of manslaughter. Undoubtedly if the jury believed, beyond a reasonable doubt, that appellant had killed Myrtle Patricia Cathey they would not have returned a verdict of manslaughter but murder in the second degree. They did not believe the testimony of appellant that Myrtle Patricia Cathey did leave the Alibi Club on the early morning of January 22, 1955 and did not return until about two or three o'clock in the afternoon of said day. No attempt was made by the Government to investigate his said statement and so the burden of proof as to

the truth of the statement rested entirely upon appellant. He was found guilty because he was unable to prove his innocence and under the decision of this Court in the *Karns* case, above cited, the presumption of innocence follows the defendant during the entire trial of the case and it is not incumbent upon him to prove his innocence (Wharton's Criminal Evidence, 11th Edition, Vol. 2, p. 1608, also Sec. 925, pp. 1616-1618).

For the reasons stated, we believe that a judgment of acquittal should be ordered or in the alternative that the decision of the District Court be reversed and a new trial ordered.

Dated, Fairbanks, Alaska,
April 12, 1956.

Respectfully submitted,

WARREN A. TAYLOR,

JULIEN A. HURLEY,

Attorneys for Appellant.

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BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

The appellant, Leon D. Urban, was at the Alibi Club in the early morning hours of January 22, 1955.

The Alibi Club was a small bar located in the south part of Fairbanks, Alaska. The appellant and the deceased, Myrtle Patricia Cathey, who were living together as though they were married, were joint liquor licensees of the Alibi Club at the time.

That morning the appellant went over to the Players Club, knowing that the deceased was there. The Players Club was another bar, approximately one mile closer into the City of Fairbanks, Alaska. Upon arrival, the appellant had "a few words" with the deceased and then proceeded to remove her forcibly from the Players Club. (Tr. 167-170, 174-183, 224-234). The appellant then placed the deceased in the back seat of a taxicab and proceeded to beat her in the course of the return trip to the Alibi Club (Tr. 189-220). Upon arrival, appellant pulled the deceased from the cab into the bar by the hair of her head (Tr. 192, 197, 198, 210, 212).

After the appellant apparently made some effort to take the deceased to the hospital later that day (Tr. 481-490), he called a doctor. Doctor Harvey W. Anderson went to the Alibi Club, examined the deceased and treated her (Tr. 57-63). Doctor Anderson was again called to the Alibi Club to treat the deceased on Sunday evening, January 30, 1955 (Tr. 59). The doctor ordered the deceased hospitalized, and the deceased expired at 1:30 a.m. on January 31, 1955 (Tr. 121, 128). Dr. Anderson performed an autopsy on the deceased later that day and determined the cause of her death (Tr. 46, 48, 50, 51, 55, 94, 95). This was directly connected with a beating.

Rose McGraw and Frank Meyers stated that they were in the Alibi Club during the week of January 24 through January 29 and heard the deceased moaning in the bedroom (Tr. 187, 253). The appellant explained that the club was closed earlier that week because he and the deceased had the stomach flu (Tr. 186). The door to the bedroom was observed to be locked from the outside on one of these occasions (Tr. 255). Other witnesses, on rebuttal, testified much in line with the testimony of McGraw and Meyers (Tr. 597-601, 601-606, 613-617, 617-626). Meyers also testified to a former assault upon the deceased by the appellant, earlier in the month of January at the Club Alibi. This was admitted only as demonstrating the state of mind of the appellant (Tr. 248).

The parka that belonged to the deceased was admitted into evidence (Government's Exhibit "H") as was the sweater of the deceased (Government's Exhibit "I"). These items were picked up by a dry cleaner from the Alibi Club on January 26 (Tr. 258-264, 280) and tagged by number and with the appellant's name entered of record (Tr. 274-279). Blood was observed on the parka at the time (Tr. 260, 268, 281-283) as well as on the sweater (Tr. 281). Don McVeigh, owner of the cleaning plant, cleaned the garments and soon thereafter they were returned to the Alibi Club (Tr. 281, 282, 261, 262).

Various inconsistent accounts regarding the deceased were related by the appellant after her death. These included an explanation of her injuries to William B. DeWalt, Fairbanks City Police Officer, who

accompanied the ambulance to the hospital on January 30 (Tr. 153-159), to the nurses at the hospital (Tr. 118-126, 126-130). Also, to Donald Byrum, another city police officer (Tr. 160-165), to Francis X. Wirth, Jr., a third city police officer (Tr. 301-311), to James J. Goodfellow, a Territorial Police Officer (Tr. 285-301), and to E. L. Mayfield, acting officer-in-charge of the Fairbanks detachment of Territorial Police (Tr. 317-333).

Dr. Anderson was not asked any questions as to whether or not the deceased had been dragged by the hair of her head (Tr. 38-117). Dr. Paul B. Hagglund, an orthopedic surgeon, in rebuttal did not agree with Dr. Henry Storres (Tr. 569-577) as Dr. Hagglund stated that there would not necessarily be any superficial evidence concerning the scalp of a person dragged by the hair of their head, as was the deceased (Tr. 630-638).

The appellant was indicted for murder in the first degree in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949, as stated on page 2 of appellant's counsel's brief. However, at the close of the case, but before the jury was given its instructions, the government moved to dismiss the aforesaid charge, and to submit the case to the jury on the charge of second degree murder (Tr. 691-695). This motion was granted by the trial Court and the jury was so instructed (Tr. 696). The jury convicted the appellant of the lesser offense of manslaughter. Appellant then moved for a new trial, which was denied, and he then appealed to this Court.

QUESTIONS PRESENTED.

Appellant has limited the questions presented in this appeal to three specific points set forth on page 2 of his brief. They are: (1) That the trial Court erred in denying his motion for a judgment of acquittal at the close of the government's case and at the close of all the evidence. The particular ground for both of these motions was that there was a total failure of proof as to the essential elements of the crime charged. (2) That the trial Court erred in admitting into evidence enlarged pictures of the body of the deceased (Government's Exhibits "A" through "F") over the objection of the defendant-appellant. (3) That the trial Court erred in refusing to instruct the jury regarding circumstantial evidence, at the request of the appellant.

ARGUMENT.

I.

APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT
THE CLOSE OF THE GOVERNMENT'S CASE AND AT THE
CLOSE OF ALL THE EVIDENCE WAS PROPERLY DENIED.

Sherry Yendes took the appellant to the Players Club in the early morning hours of January 22, 1955. When the appellant asked Pat Cathey, the deceased, to come home, and she would not, Yendes *saw* the appellant grab the deceased by the arm and *heard* him call her a "bitch" (Tr. 167, 168). James J. Murray, a patron in the Players Club at that time, heard a commotion and *saw* the deceased on the floor of the bar, with a man standing behind her bending over her

(Tr. 224-234). George E. Haritos, another patron who was standing near Murray in the bar at the time, *saw* the deceased abruptly leave the bar and attempt to return, only to be thwarted. Haritos, who had seen the deceased for some forty-five minutes in the bar and who had been sitting next to her and had bought her "a drink" stated that there was nothing wrong with her physical appearance prior to her untimely exit from the bar. When she left the bar, Haritos went outside to *see* a taxicab pull away, with somebody beating the deceased in the back seat (Tr. 174-183). (Emphasis supplied).

Marvin T. Jennings, driver of that cab, did not pay any particular attention to the deceased when she entered with the appellant except to help slide her across the back seat. However, he *heard* the appellant hit her several times and Jennings testified that the appellant knocked her down on the floorboard of the cab, picked her up, and knocked her against the cab door (Tr. 191, 195, 200-203, 204). This took place in the course of a five minute ride to the Club Alibi, which was approximately one mile distant. The appellant, the deceased, and Jennings were the only occupants of the cab. Upon arrival at the Club Alibi, Jennings stated that he *saw* the deceased slumped on the back seat (Tr. 212), and that he *saw* blood on her face (apparently from her nose) and on down her clothes (Tr. 192, 196) and on the seat of the cab, and that she appeared to be passed out (Tr. 193). Also, that he *saw* the appellant get out of the cab, unlock the door to the Club Alibi, and drag the deceased some

ten feet into the building by the hair of her head, with her feet dangling behind her (Tr. 192, 197, 198, 210, 212). This occurred at approximately 4:00 a.m. on the morning of January 22, 1955. (Emphasis supplied.)

Dr. Harvey W. Anderson, who responded to the appellant's call to the Club Alibi on the evening of January 22, found the deceased to be under the influence of alcohol, with stale cuts on her lips but with gross swelling of both cheek regions, a small cut on her nose, and a bruise behind her left ear (Tr. 57, 63-65). These were of a bluish color and not too evident (Tr. 60, 93). Dr. Anderson considered these bruises to be recent—within a twenty-four hour period (Tr. 93). After treating the deceased, Dr. Anderson told the appellant to call if he thought she needed further treatment (Tr. 58, 63). The appellant did not call until Sunday evening, January 30, however. Again going to the Club Alibi, Dr. Anderson saw the deceased in the same bedroom near the bar proper, and immediately noted signs of a serious brain injury. An ambulance was promptly called and the deceased was removed to the hospital (Tr. 59). Dr. Anderson stated that he also noticed that the various skin discolorations, previously mentioned, had a darker, "more purplish" color at that time (Tr. 59).

The deceased expired at approximately 1:30 a.m. on January 31, 1955, (Tr. 121, 128). Dr. Anderson performed the autopsy in the afternoon of January 31 at request of U. S. Commissioner La Dessa Nordale. From this, Dr. Anderson determined that the cause of death was from a brain injury as evidenced by

subdural hematoma (Tr. 46), which was the result of external injuries about the face and head, behind the ears, and to the temporalis muscles of the head of the deceased (Tr. 48, 49, 98); further, that the injuries resulted from blows to this region from a fist "or blunt object" (Tr. 50, 51, 98). Dr. Anderson discounted any possible spontaneous hemorrhages in this instance (Tr. 55, 94), and stated that the hemorrhage on the brain in this case was anywhere "from several days to a week or two weeks old" at the time of the autopsy (Tr. 90). This testimony had a direct relation to the conduct of the appellant concerning the deceased on January 22, 1955.

If the appellant purposely and maliciously killed the deceased he could have been found guilty of second degree murder, under the Alaskan statute (A.C.L.A., 1949, Section 65-4-3). If the appellant unlawfully killed the deceased he could have been found guilty of manslaughter, under the Alaskan statute (A.C.L.A., 1949, Section 65-4-4), as he was in this case.

Throughout the trial the government contended that, while normally the requisite intent to kill or do great bodily harm, and the requisite malice may not be inferred from a beating with the fists alone, still a situation can exist (and did exist in this case) where both the aforesaid intent and malice could be implied from such acts and from the particular circumstances of the case and, as such, would be a question of fact for the jury. (*People v. Crenshaw*, 131 N.E. 576, 578 (Sup. Ct. Ill., 1921); *McAndrews v. People*, 208 P. 486 (Sup.

Ct. Col., 1922); *Milosevich v. People*, 199 P. 2d 895, 897 (Sup. Ct. Col., 1948).) Here, considering the deceased to be a woman (5 ft. 6 in. tall, 150 lbs. weight) and the appellant to be a man (6 ft. tall, 200 lbs. weight) of powerful build, coupled with the amount of violence involved in taking the deceased from the Players Club to the Club Abili, supra, the requisite intent and malice, to establish the charge of second degree murder, can be inferred from the circumstances. (*Commonwealth v. Buzard*, 76 A. 2d 394, (Sup. Ct. Pa., 1950); *Commonwealth v. Lisowski*, 117 A. 794, (Sup. Ct. Pa., 1922); *Commonwealth v Dorasio*, 74 A. 2d 125, 130 Sup. Ct. Pa., 1950).) Certainly then, the evidence is sufficient to sustain a conviction of manslaughter, where the aforesaid intent and malice are not necessary elements.

Frank Meyers testified to a former assault upon the deceased, by the appellant, earlier in the month of January, 1955, in the Club Alibi. This testimony was admitted by the trial Court only as demonstrating the state of mind of the defendant (Tr. 248). (*State v. Rediker*, 8 N.W. 2d 527, 533 (Sup. Ct. Minn., 1943); *State v. Justice*, 71 P. 2d 798 (Sup. Ct. Ore., 1937); *People v. Palassou*, 111 P. 109, 110 (Ct. of Appeals, Calif., 1910); Wharton's Criminal Evidence, 11th Ed., Section 353).)

As appellant has stated on page 12 of his brief, the trial Court instructed as to direct and circumstantial evidence, stating, amongst other things, "... The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required

for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions” (Tr. 669).

The trial Court also instructed, as follows:

“(16) Evidence was offered in this case for the purpose of showing that the defendant committed assaults on Myrtle Patricia Cathey prior to the date of the assault alleged in the indictment.

“Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the offense of murder in the first degree or the included offense of murder in the second degree.

“You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other in the case.

“The value, if any, of such evidence depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime of murder in the first degree, or the included offense of murder in the second degree, as pointed out in other of my instructions” (Tr. 670).

The appellant has not taken an appeal from the judgment, but from a denial of the motion for judgment of acquittal. In *Henderson v. United States*, 143 F. 2d 681 (9 Cir. 1944), this Court said:

“(1) It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorable to the prosecution.” (Id., p. 682).

Considering the evidence in the light most favorable to the government (*Woodard Laboratories v. United States*, 198 F. 2d 995, 998 (9 Cir. 1952); *Schino v. United States*, 209 F. 2d 67, 72 (9 Cir. 1953), cert. denied, 347 U.S. 937 (1954); *Bateman v. United States*, 212 F. 2d 61, 70 (9 Cir. 1954)) it is sufficient to sustain the jury’s verdict.

II.

THE ADMISSION IN EVIDENCE OF THE ENLARGED PICTURES OF THE BODY OF THE DECEASED DID NOT SUBSTANTIALLY PREJUDICE THE APPELLANT.

James G. Goodfellow, a Territorial Police Officer with two and three-quarters years experience, testified that he took the six pictures (Government’s Exhibit “G”) of the deceased in the afternoon of January 31, 1955, at the funeral home in Fairbanks, Alaska, and that he did so in the course of his official duties, using a four by five graflex camera which belonged to the police. He also stated that each enlargement (Government’s Exhibits “A” through “F”) fairly represented the condition of the particular portion of the body at the time that Goodfellow viewed it (Tr. 30-36).

James L. Douthit, a professional photographer for six years employed by a local Fairbanks newspaper, stated that he enlarged Government's Exhibits "A" through "F" from negatives given him by Lieutenant Trafton of the Territorial Police. Douthit stated that any distortion appearing in the enlargements would be so small that it couldn't be measured, and that it would be normal for such a process. He also testified that each enlargement was a fair reproduction of the print from the negative (Tr. 130-135).

Government's Exhibits "A" through "F" were offered and received into evidence for the purpose of establishing identity and also the character of the wounds of the deceased (Tr. 135). The small, regular sized contact prints were offered into evidence for the purpose of comparison, and were received without objection from the appellant (Tr. 136). Later, the appellant's attorney moved to strike the exhibits ("A" through "F"). Argument was had and the trial Court denied the motion (Tr. 438).

In *State v. Hause*, 130 A. 743, (Sup. Ct. N.H., 1925) photographs were taken of the head of the deceased, and the enlargements were offered into evidence and objected to as being distorted. On appeal, the Court said:

"(6) Respecting the relevancy of the photographs, it may be said that they would seem relevant for their bearing on the nature and degree of the crime and on the respondent's purpose and mental state, as well as to aid in making clear the oral testimony about the injuries. . . .

“(8) If the stated ground of distortion implied a general ground of prejudice, whether they were unduly prejudicial or not was a question of fact to be determined in the court’s discretion. . . . It is not to be assumed that the photographs were red flags necessarily arousing the jury’s passions and a will to avenge. Since they were relevant, their probable importance was to be compared with their probable prejudicial effect on the inquiry whether they would do more good than harm, and the finding that they would is a reasonable one. . . .” (Id, p. 744)

As to the purpose of establishing identity, in *Vaughn v. State*, 183 So. 428 (Sup. Ct. Ala., 1938) in discussing the defendant’s contention that the use of a photograph of the deceased, properly identified, was error prejudicial, and immaterial to any issue in the case, the Court stated:

“The photograph, not here produced, had a legitimate place as a matter of identification, and it was also referred to by witness McDaniel for identification and witness Parker, who had never known deceased, identified her from the photograph as the woman he saw at Greenwood’s on the fatal night. The objection to the introduction of the photograph was properly overruled.” (Id., p. 430). See also *Wilson v. United States*, 162 U.S. 613 (U.S. Sup. Ct., 1896)

And as bearing on the question of the nature of the wounds, in the case of *State v. Lantzer*, 99 P. 2d 73 (Sup. Ct. Wyo., 1940) the Court stated:

“We assume that photographs should be excluded when they do not tend to prove any controverted fact, but have a tendency to create unfair prejudice, on the same principle that, under like circumstances, authorizes or requires the exclusion of bloody clothing of the deceased, or instruments used by defendant in committing the crime. . . . The photographs in question merely gave the jury a better description than could have been given by words. They cannot be characterized as gruesome or inflammatory. The body of the dead woman lay on its back hiding the wound and blood. We cannot hold that the photographs had such a tendency to create unfair prejudice that it was the duty of the court to exclude them from the evidence.” (Id. p. 78)

To a like effect is *People v. Smith*, 104 P. 2d 510 (Sup. Ct. Cal., 1940) wherein four photographs of the deceased's body as seen shortly after the homicide and photographed from different angles, were admitted into evidence. On appeal, the Court said:

“The condition of the body had been described by several witnesses, and the photographs merely portrayed facts which the jury was entitled to have placed before it. They possessed evidentiary value and tended to clarify the evidence theretofore presented by several witnesses concerning the position of the body in its relation to the gun and the other pertinent objects found on the floor after the homicide. The admission in evidence of the photographs was within the trial

court's discretion, and clearly was not erroneous. . . ." (Id., p. 515)

III.

INSTRUCTION OF THE TRIAL COURT REGARDING THE LAW OF CIRCUMSTANTIAL EVIDENCE WAS ADEQUATE.

In this case, the Court instructed as to direct and circumstantial evidence, as stated on page 29 of appellant's brief. The Court also instructed as to reasonable doubt, as follows:

"(14) The law does not require the defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the prosecution to establish his guilt by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential, substantial part of the law and is binding on you in this case.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the prosecution to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding convic-

tion of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." (Tr. 668-669)

There was no objection to this instruction on the part of the appellant (Tr. 677-681).

In *Karn v. United States*, 158 F. 2d 568 (9 Cir. 1946) this Court said:

"The prosecution relied *entirely* upon circumstantial evidence for a conviction. It is sufficient to say *that under such circumstances* the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis, but that of guilt. 23 C.J.S. Criminal Law, (Section) 907, pp. 151, 152; *Paddock v. United States*, (9 Cir. 1935), 79 F. 2d 872, 876; *Ferris v. United States* (9 Cir. 1930), 40 F. 2d 837, 840. Our considered judgment is that the evidence in this case falls short of meeting this exacting standard." (Id., p. 570) (Emphasis supplied)

In *McCoy v. United States*, 169 F. 2d 776 (9 Cir. 1948), however, where both direct and circumstantial evidence existed and where the trial Court refused to give appellant's specific instruction of circumstantial evidence, this Court said:

" . . . Much evidence, which, with its recital, would be classed as direct evidence, upon closer observation turns out to be circumstantial in character. Events occur so often in pattern that we accept them as direct evidence of a fact proved, whereas they are only facts which habitually accompany the fact we deem proved. Any rule for the special treatment of evidence upon the basis of its character, direct or circumstantial, is bound to be difficult of correct application. And too, any instruction to a jury directing a different treatment for circumstantial evidence that is to be accorded direct evidence will, if heeded at all, tend to confusion and incite in the juror's mind the too prevalent and persistent illusion that circumstantial evidence is inferior to direct evidence . . . The books are full of judicial discord through attempts to distinguish between direct and circumstantial evidence in jury instructions." (Id. pp. 784, 785)

in commenting on the trial Court's general instruction of this subject, this Court said:

"A single circumstance, standing alone, with the realm of the possible, can usually be accounted for upon an innocent basis. But the jury is charged with making all of its conclusions upon the basis of what is reasonable and at every turn under the

admonition that the accused is presumed to be innocent and under the necessity of declining to find guilt until the proof convinces beyond a reasonable doubt. The instruction quoted fits all the evidence of facts into an integrated whole, and when this has been done and the jury's verdict is guilty, the jury has found that no other determination could be reasonable. 'That a hiatus exists here whereby the evidence may reasonable be held not to be inconsistent with some hypothesis of fact other than guilt is faulty reasoning.'" (Id., p. 786)

And in *Schino v. United States*, 209 F. 2d 67 (9 Cir. 1953), cert. denied, 347 U.S. 937 (1954) this Court said:

"Appellants each assert that, as to himself, the evidence is insufficient to support the verdict. In determining this question, we must consider the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 68, 62 S.Ct. 457, 86 L. Ed. 680; *Woodard Laboratories v. United States*, 9 Cir., 198 F. 2d 995. Viewed in this light, the states of the evidence is such that a juror's reasonable mind 'could find that the evidence excludes every reasonable hypothesis but that of guilt.' In such a situation, the case must be submitted to the jury, and their decision is final. *Remmer v. United States*, 9 Cir., 205 F. 2d 277, 287-288, and cases cited. *The theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as with guilt, has been laid to rest in this circuit by the Remmer case, at least where, as here, the*

question arises on a motion for a judgment of acquittal.” (Id., p. 72) (Emphasis supplied)

In this case, where both direct and circumstantial evidence are prevalent, the following is important:

“Petitioners press upon us, finally, the contention that the instructions of the trial court were so erroneous and misleading as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. But some require comment. The petitioners assail the refusal of the trial judge to instruct that where the Government’s evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, *Garst v. United States*, 180 F. 339, 343; *Anderson v. United States*, 30 F. 2d 485-487; *Stutz v. United States*, 47 F. 2d 1029, 1030; *Hanson v. United States*, 208 F. 2d 914, 916, *but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an addition instruction on circumstantial evidence is confusing and incorrect*, *United States v. Austin-Bagley Corp.*, 31 F. 2d 229, 234, cert. denied, 279 U.S. 863; *United States v. Becker*, 62 F. 2d 1007, 1010; 1 Wigmore, *Evidence* (3d ed.), (Sections) 25-26.

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence, Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury

is convinced beyond a reasonable doubt, we can require no more." (Id., pp. 139, 140) (Emphasis supplied)

CONCLUSION.

For the reasons set forth above, appellee requests this Court to affirm the judgment of the Court below.

Dated, Fairbanks, Alaska,

June 18, 1956.

Respectfully submitted,

GEORGE M. YEAGER,

United States Attorney,

PHILIP W. MORGAN,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.



Appendix

ALASKA COMPILED LAWS ANNOTATED, 1949.

§65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.

§65-4-3. *Second degree murder.* That whoever purposely and maliciously, except as provided in the last two sections, kills another, is guilty of murder in the second degree, and shall be imprisoned in the penitentiary not less than fifteen years.

§65-4-4. *Manslaughter.* That whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter, and shall be imprisoned in the penitentiary not more than twenty nor less than one year.



IN THE

United States Court of Appeals

For the Ninth Circuit

LEON D. URBAN

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING

On Appeal from the District Court of the United States
for the District of Alaska, Fourth Judicial Division.

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FILED

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No. 14,883

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON D. URBAN

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING

On Appeal from the District Court of the United States
for the District of Alaska, Fourth Judicial Division.

The appellant, Leon D. Urban, respectfully requests this court to again re-examine the charge to the jury relating to reasonable doubt. Appellant contends that the charge as given was not correct nor adequate and that it conveyed to the jury a confusing concept of reasonable doubt.

STATEMENT

The court instructed the jury on reasonable doubt as follows:

“(14) The law does not require the defendant to prove his innocence, which, in many cases,

might be impossible, but, on the contrary, the law requires the prosecution to establish his guilt by legal evidence and beyond a reasonable doubt.

“The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential, substantial part of the law and is binding on you in this case.

“A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the prosecution to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant’s guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant’s guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

“Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding con-

viction, to a moral certainty, of the truth of the charge.”

and on direct and circumstantial evidence as follows:

“15) Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a [719] crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions.”

The appellant requested and was refused an instruction that circumstantial evidence must be consistent with guilt and inconsistent with any other reasonable hypothesis (Tr. 680-681).

ARGUMENT

Appellant is aware that the Supreme Court has held that such an additional instruction on direct and circumstantial evidence is both confusing and incorrect. But the court as ruled that this omission is only the better rule where the jury is properly instructed on the standards of reasonable doubt. *Holland vs. U. S.*, 348 U.S. 121 at 139.

This protection afforded by this additional instruction on circumstantial evidence has found support in many cases.

Gorst vs. U. S., 180 F. 339, 343 (CA 4th Va.)

Anderson vs. U. S., 30 F. (2d) 485-487 (CA 5th Tex.)

Stutz vs. U. S., 47 F. (2d) 1029, 1030 (CA 5th Fla.)

Hanson vs. U. S., 208 F. (2d) 914-916 (CA 6th Ohio)

The removal of this protection to the defendant can only be sanctioned when the accompanying instruction on reasonable doubt is absolutely free from confusion.

The Supreme Court in the *Holland* case *supra* at page 140 clearly expressed what it considered to be the essentials of an adequate definition of reasonable doubt.

The appellant respectfully contends that the court below in its charge on reasonable doubt did not meet those essentials.

The effect of the trial court's instruction was that a reasonable doubt existed if after considering all of the evidence, the jury could *candidly say* that they were not satisfied as to the defendant's guilt. The court's further attempt to define the absence of a reasonable doubt only added to the confusion.

If the word "doubt" is to have any logical meaning in a criminal charge relating to "reasonable doubt," it must be defined to the jury as the type of doubt that makes one hesitate to act in weighty and important matters relating to his own affairs. If reasonable doubt is present, it must make a jury hesitate to convict.

Holland vs. U. S., 348 U.S. 121 at 140

Commonwealth vs. Miller, 139 Pa. 77, 21 A. 138 at 140

The instruction of the court relating to the presence of reasonable doubt only when the jury could not *candidly say* they were satisfied as to his guilt, clearly implies that nothing more than a preponderance of the evidence is required to tip the scales of balance to the absence of reasonable doubt, and guilt.

People vs. Bemmerly, 87 Cal. 117 at 121
25 Pac. 266 at 267-268

The court below instructed the jury that they would not have a reasonable doubt if they had an abiding conviction of the defendant's guilt, such as they would be willing to act upon in more weighty and important matters relating to their own affairs.

Appellant contends that this failure of the court to equate the circumstances for both the presence and the absence of reasonable doubt seriously prejudiced him.

The initial part of the definition of reasonable doubt while defining its presence clearly implies that if something more than a preponderance of the evidence is present, reasonable doubt would be absent. While the latter part of the definition defines the absence of reasonable doubt as an abiding conviction to act in weighty and important matters relating to the jury's own affairs.

Nowhere is the suggestion of the Supreme Court in *Holland vs. United States* followed (*supra* pg. 140).

“He (the trial judge) defined it as ‘the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.’ We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act.”

This is also the holding of *Bishop vs. United States*, 107 F. (2d) 297 at 303.

“Reasonable doubt is a doubt arising from the evidence or from the lack of evidence, after consideration of all evidence. It is not a vague, speculative, imaginary something, but just such a doubt as would cause men to hesitate to act upon it in matters of importance to themselves.”

See also

Lovett vs. State, 30 Fla. 142, 11 SD 550,
552-554

Nevada vs. Rover, 11 Nevada 343, 344-350

It was certainly possible for this jury to be *candidly satisfied* of the defendant's guilt, and therefore from the instruction not have a reasonable doubt, and yet, if properly instructed, they might have possessed such a doubt concerning the defendant's guilt, that if they had a similar doubt relating to weighty and important affairs of their own, they would have hesitated to act. Under such circumstances the verdict would have been an acquittal.

Taken as a whole, this charge does not measure up to the essentials laid down by the Supreme Court. This is not a matter of semantics but rather a challenge to this court to define at least for this Circuit a confusion-free instruction on reasonable doubt. This appellant was entitled to such an instruction in this case. For these reasons it is respectfully submitted that the matter be remanded for a new trial.

HALEY & MCINERNEY,
Attorneys for Appellant.



**In the United States Court of Appeals
for the Ninth Circuit**

COMMODITY CREDIT CORPORATION, APPELLANT

v.

ROSENBERG BROS. & Co., INC., A CORPORATION, APPELLEE
and

ROSENBERG BROS. & Co., INC., A CORPORATION, APPELLANT

v.

COMMODITY CREDIT CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTH-
ERN DIVISION

BRIEF FOR THE UNITED STATES

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14884

COMMODITY CREDIT CORPORATION, APPELLANT

v.

ROSENBERG BROS. & Co., INC., A CORPORATION, APPELLEE
and

ROSENBERG BROS. & Co., INC., A CORPORATION, APPELLANT

v.

COMMODITY CREDIT CORPORATION, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTH-
ERN DIVISION*

BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The Secretary of Agriculture issued a press release on September 5, 1947, announcing a dried fruit purchase program designed to support and stabilize dried fruit prices. Among other things, this program contemplated the purchase by Commodity Credit Corporation (hereinafter referred to as CCC) of 61,000 tons of raisins. Subsequently, CCC issued invitations to bid

on this quantity. Plaintiff's predecessor (hereinafter referred to as The Company) offered to sell a large quantity of raisins, and the offers were accepted by CCC up to the amount of 14,000 tons, and contracts for that amount were thereupon executed. The Company had sold short, and before it had purchased raisins to cover its CCC sales, CCC revised the program by increasing the total raisin purchase from 61,000 tons to 121,000 tons. Subsequently, The Company purchased raisins at prices which plaintiff alleges were higher than they would have been had there been no change in program. The Company filed a complaint (R. 3), alleging breach of both an express and an implied agreement by CCC to restrict its raisin purchase to 61,000 tons. The Government answered, denying any breach, and the case was at issue. The case was tried, and the District Court ruled that the act of the Government in revising the program was a breach of CCC's implied agreement not to hinder or increase the cost of The Company's performance. On May 31, 1955, the Court entered judgment for plaintiff in the amount of \$160,366.88. The defendant filed notice of appeal from the judgment on the 30th day of June, 1955, and the plaintiff filed notice of cross-appeal from the judgment on the 25th day of July, 1955. The plaintiff's action in the District Court was based upon 15 U. S. C. 714b(c). This Court's jurisdiction rests on 28 U. S. C. 1291.

STATEMENT OF THE CASE

On August 1947, the Department of Agriculture adopted a docket styled *Dried Fruit Price Support Program, OC-95A* which was amended from time to time, (Plaintiff's Exhibit 5).¹ This docket as first

¹ The exhibits introduced are listed in Appendix A.

adopted provided for a total purchase of 133,000 tons of dried fruit including 36,000 tons of raisins plus a contingent purchase of an additional 25,000 tons of raisins. The maximum amount of 133,000 tons was inserted in the docket for the purpose of placing a limit upon the contractual authority of the Government's contracting officials (R. 458-459). On September 5, 1947, the Secretary of Agriculture with reference to said docket, issued a press release in Albuquerque, New Mexico, which stated that the Commodity Credit Corporation would purchase up to 133,000 tons of dried fruit including 61,000 tons of raisins, and that the purchases would be made from processors and packers (Plaintiff's Exhibit 4). On September 10, 1947, the Department of Agriculture, by Announcement No. 1, invited offers for the sale of 30,000 tons of raisins and various quantities of other dried fruits (Plaintiff's Exhibit 9). Rosenberg Bros. & Co., the predecessor in interest of the present plaintiff, and referred to herein as The Company, submitted an offer on September 19, 1947, to sell 10,000 tons of raisins to CCC at prices ranging between \$151.00 to \$152.00 per ton, the amount depending upon the containers used. This offer was accepted on or about September 23, 1947, and on the following day a standard Government contract was executed between The Company and CCC, by the terms of which The Company agreed to deliver 10,000 tons of raisins to CCC in the period October 1-December 15, 1947, upon demand and at the stated prices (Plaintiff's Exhibits 10, 11, and 12).

On October 1, 1947, the Department of Agriculture issued Announcement No. 2 which invited bids for dried fruit including 31,000 tons of raisins. On October 8, 1947, The Company in response to this Announcement

offered to sell 10,000 tons of raisins (Plaintiff's Exhibits 14, 15). On October 9, 1947, the docket was amended (Amendment No. 1), and provision made for increasing the maximum quantity of raisins to be purchased to 121,000 tons, *if such action was required to successfully carry on the price support program* (Plaintiff's Exhibit 5). The record is not clear as to when the Secretary of Agriculture approved the docket but it appears to have been several days later (R. 120-122).

On October 13, 1947, the CCC accepted plaintiff's offer of October 8 to the extent of 4,330 tons priced at \$149.40 per ton, and on that date a contract was executed for said amount at said price (Plaintiff's Exhibit 15, 16). On October 14, the Department of Agriculture publicly announced Amendment No. 1 to Docket OC-95a stating that offers would be made to purchase an additional 60,000 tons of raisins (Plaintiff's Exhibit 19). The Company promptly requested cancellation of its contracts following this public announcement, but this request was denied (Plaintiff's Exhibits 17, 23, 26). On October 17, 1947, CCC by Amendment No. 2 to said docket authorized purchase of raisins from growers or processors (Plaintiff's Exhibit 5). On November 26, 1947, the program was further modified by requiring all packers *thereafter* selling Thompson seedless raisins to CCC to certify that they had paid the grower not less than \$135.00 per ton (Defendant's Exhibit R; Plaintiff's Exhibit 24).

The Company at the time of executing said contracts had not purchased and did not have available raisins to fill the Government contracts. It was selling short in the hope that raisins would drop in price sufficiently to enable The Company to fulfill the Government con-

tracts without loss (R. 196, 344-345, 586; Defendant's Exhibits K). However, the growers were in continuous resistance to the lower prices offered by the packers and only 800 tons were purchased by The Company in the period September 1-November 3, 1947 (R. 54, 57, 203-206; Plaintiff's Exhibit 46).² After that date natural raisins were sold in substantial quantities at prices ranging from \$127.00 to \$142.00, the peak price being reached in the week ending November 10, 1947 (Defendant's Exhibits K, S, Plf. Exh. 46).³ Since The Company's normal processing and packing cost was \$40.00 per ton, it was impossible for The Company to purchase raisins at these prices without suffering a substantial loss on its Government contracts. Although CCC continuously demanded raisins under the contracts, The Company consistently refused to deliver, stating that it had no raisins available (Defendant's Exhibits V, W, X; Plaintiff's Exhibit 42, R. 301-302, 317-319). In January 1948, the price dropped sharply and raisins were being sold in that month at prices ranging from \$100.00 to \$125.00 (App. C). By that time CCC was out of the market, The Company's commercial sales were 80% complete, and The Company became acutely conscious of the fact that it had more than enough raisins on hand to fill its remaining commercial commitments. Fearing that it would be left with a large unsold inventory, The Company decided to make delivery to the Government (Defendant's Exhibits D, AC; Plaintiff's Exhibit 44, p. 7; R. 338). In January, the price of raisins had dropped to a point which would enable The Company to purchase raisins

² The Company's purchases on closed contracts are tabulated in Appendix B.

³ The market prices for the 1947 crop are set forth in Appendix C.

and fulfill its Government contracts, and the Government thereupon requested The Company to make delivery (Plaintiff's Exhibit 29, App. C).

On January 22, 1948, The Company requested shipping instructions and an amendment to the contract reinstating the tonnage and extending the delivery dates. The contracting officer agreed to furnish an amendment reinstating the tonnage and extending the delivery dates, and agreed further that no damages for non-delivery would be claimed by CCC provided The Company agreed to waive all carrying charges. The contracting officer stated that CCC was willing to take delivery at the contract prices, and further stated that the prices would not be raised except with respect to a minor adjustment which related to the type of containers involved. The Company inquired as to whether it could make delivery without prejudice to a claim for additional compensation and was advised that any counter-offer or qualification would require a review by the officials in Washington, and that pending such review, shipping instructions would necessarily have to be issued to other packers. The contracting officer also stated that if The Company would agree to make immediate delivery, shipping instructions would be issued at once, but that CCC could not agree to anything that could be interpreted as recognizing a claim by The Company. On January 28 The Company agreed to make delivery, and delivery was made in the period February-March 1948 (Plaintiff's Exhibits 30, 32, 33, 35, 36, 42, 43; R. 269-270, 604-614).

Vouchers were submitted by The Company at the contract prices and The Company was paid on that basis (Defendant's Exhibit Y; R. 635-636). Plaintiff filed a claim which was denied and this suit was instituted. Plaintiff's complaint sets forth two causes of

action (R. 3). It alleges in substance that the press release was a contractual commitment, and that defendant was under obligation to restrict its purchases to the amounts therein specified. In its second cause of action, plaintiff alleged that the Government's act in revising the purchase program was in violation of its implied obligation to refrain from hindering or increasing The Company's cost of performance. The Government, in its answer (R. 19), denied the existence of such an express or implied contract, and by way of an affirmative defense alleged that the actions complained of were sovereign in their nature and that no liability resulted, and further, that The Company by reinstating the contracts upon the understanding that no claim would be asserted waived the alleged breach.

The District Court ruled in favor of plaintiff, holding that the revised program was in violation of an implied agreement not to increase The Company's cost of performance. The Court further ruled that the acts in question were proprietary and not sovereign, and that there was no evidence establishing the existence of a waiver by The Company of the alleged breach.

Since raisins are a fungible product it was impossible to determine the price paid by The Company for such raisins furnished to CCC. The minimum average price which The Company could have paid for the raisins was \$116.16 per ton (Defendant's Exhibit AO). The District Court, however, fixed the price paid by The Company at \$120.52 per ton. This figure covered raisins priced up to the final date of delivery (Defendant's Exhibit AO). The District Court also found that The Company would have purchased raisins at \$110 per ton had the Government adhered to the purchase program first announced, and awarded damages in the total amount of \$160,366.88 (R. 65).

SPECIFICATION OF ERRORS

The points on which the Government intends to rely are set forth in their entirety in Record 677-682. Although the Government has no intention of waiving any of these points on appeal, the following major specification of errors will make clear to the court the issues which are involved:

1. The District Court erred in holding that defendant breached an implied obligation not to hinder, or increase the cost of, performance of Rosenberg Bros. & Co.'s (hereinafter referred to as R. B. & Co.) Government contracts.

2. The District Court erred in finding that the parties did not and could not contemplate the possibility that CCC might modify the program announced in the press release of September 5, 1947, and that R. B. & Co. did not assume the risk of modification.

3. The District Court erred in finding that had the CCC program remained as announced on September 5, 1947, R. B. & Co. could have purchased naturally conditioned raisins at \$110 per ton or less.

4. The District Court erred in holding that the raisin purchase program of CCC was a corporate, commercial and private act, not involving the exercise of Governmental and/or sovereign powers.

5. The District Court erred in holding that R. B. & Co. did not waive its right to claim damages resulting from the alleged breach of contract by CCC.

6. The District Court erred in finding that R. B. & Co. could not have acquired raisins for delivery to CCC at an average of less than \$120.50 per ton, and in finding that by reason of the changes in docket, R. B. & Co. was damaged in the sum of \$160,366.88.

Other specifications of error directly relate or are subsidiary to the issues raised by these major specifications.

SUMMARY OF ARGUMENT

As to Sovereignty

The decision to buy more raisins was in the exercise of the statutory duty imposed upon the Secretary of Agriculture by Congress to stabilize farm prices. The fact that the policy of stabilization was achieved by purchase contracts does not establish the proprietary character of the program. Since the change of policy complained of was public and general, and sovereign in character, appellant is not liable for any damages caused thereby.

As to the Implied Contract

The District Court ruled that CCC had publicly *promised* prior to execution of the contracts in question to limit its purchase to 61,000 tons (R. 57). The breach of this promise, the Court found, was a breach of CCC's implied duty to refrain from any action which would interfere with, or increase the cost of, The Company's performance. If there is no such promise, then the Court's decision having been based upon an erroneous assumption must fall.

The announcement of the price support program carried with it no contractual commitments. A policy or program dedicated to bringing a fair return to the grower must necessarily be flexible, particularly when the initial proposal rests upon a series of speculative assumptions. Here the program was designed to remove surplus and to stabilize prices at a reasonable level. The program as initially conceived did not give

the desired price support and frequent changes were made thereafter. By the end of the crop year, purchases of all dried fruits had been increased from 133,000 tons to 285,000 tons. The possibility of changing such a program was evident to everyone including The Company. It sold short and below the market price to CCC, gambling on an expected decrease in price. CCC's program was geared to increase the price and that CCC took appropriate steps to accomplish its objective does not render the Government liable on implied contract.

As to Waiver

The Company had not purchased raisins when the alleged breach occurred. Since The Company did not contemplate any profit in performing the contract, a rescission would not have caused any damage. Therefore, the performance of the contract, not the defendant's breach, caused the damage and appellant is not liable.

The Company was guilty of breach of contract in not delivering raisins in the period specified. Following the sharp drop in the price of raisins, The Company requested CCC to reinstate the contract and to extend the time for delivery. CCC did so, and The Company performed the contract and delivery was made at contract price. Since The Company knew that the reinstatement of the contract was upon the understanding that CCC would only be liable for the contract price, The Company waived the alleged breach.

As to Damages

Plaintiff could not prove the amount paid for raisins furnished the Government hence, it must be assumed

that plaintiff paid the lowest possible price which was \$116.16 per ton. Plaintiff could not prove what price The Company would have paid had there been no change in program, hence, plaintiff has completely failed to prove any damage.

ARGUMENT

I

The Acts Constituting the Alleged Breach Were Sovereign Acts for Which the Appellant Is Not Liable in Damages.

The change in policy and program which the District Court found to be a violation of the contractual commitment of CCC was initiated by the Secretary of Agriculture and carried out by CCC, a Delaware corporation, the stock of which was wholly owned by the United States. The present suit is against CCC, a federal corporation, which succeeded to the assets and the liabilities of the Delaware corporation.⁴ CCC, the Delaware corporation, was under the jurisdiction of the Secretary of Agriculture, and was an agency of the United States. *Insurance Company of North America v. United States* (C. A. 4), 159 F. 2d 699; *United States v. Fleming* (D. C. N. D. Iowa), 69 F. Supp. 252; *Spivey v. United States* (C. A. 5), 109 F. 2d 181, 184, (cert. denied 310 U. S. 631).

It is recognized that Government agencies frequently engage in commercial activities, and that the Government is liable for damages caused by such commercial activities, to the extent that Congress has waived sovereign immunity. In this case, Congress has authorized the CCC to sue and be sued, and therefore, no

⁴ Details concerning the formation and powers of the two corporations are set forth in Appendix D.

question exists concerning the jurisdiction of the Court to award damages in the event appellee has stated and proved a cause of action.

The problem, as we see it, is to determine (1) whether the acts complained of were sovereign acts; (2) if so, whether the Government contracted to pay for damages caused by such sovereign acts; and (3) if not, whether the acts complained of constituted a breach of contract. This portion of the brief is addressed to the first question. Appellee contends, and the District Court has found, that the changes in program were in the performance of a proprietary function. Appellant challenges this conclusion. To evaluate the conclusion, it is essential to examine the purposes and programs of CCC.

Under the Government Corporation Control Act, CCC is required annually to submit to Congress a budget setting forth, among other things, its plan of operations by major types of activities, together with financial estimates in connection therewith. This budget is considered by the Congress and administrative funds are appropriated for carrying out the budgeted programs. For the fiscal year July 1947-July 1948, the operations of the Corporation, as set forth in the budget,⁵ and for which administrative funds⁶ were authorized consisted of the following major types of programs: A price support program, a foreign purchase program, a subsidy program, a supply program, and a commodity export program. The price support program was divided into three categories: (1) Price support for basic commodities, (2) price support for Steagall Commodities, and (3) price support for other commodities. It

⁵ See p. 1193 of the Budget Estimates for United States Department of Agriculture for the fiscal year ending June 30, 1948.

⁶ Act of June 30, 1947, 61 Stat. 523, 550.

is under this latter category of activities that the purchase contracts with The Company were entered into. In its report in connection with the appropriation making administrative funds available to carry out the Corporation's programs⁷ the Appropriation Committee discussed these categories and stated:

“Its [Commodity Credit Corporation] primary purpose is to support agricultural prices in order to preserve farm purchasing power and incentives for production.

“Farm Prices are supported in a number of ways:

“1. By making loans to farmers on their commodities.

“2. By purchasing commodities which are in surplus and diverting them into channels where the pressure on the normal commercial market will not be so great.

“3. By purchasing commodities for foreign distribution.”

Funds for this operation are obtained from the Treasury Department under the borrowing power of the Corporation.⁸

⁷ H. Rept. 450, 80th Congress, 1st Sess., accompanying H.R. 3601.

⁸ The price support operations of the Secretary of Agriculture are also financed, in part, through customs duties, 30% of which are transferred to the Secretary of Agriculture for price support operations, which operations are described in Section 32 of the Act of August 24, 1935, as amended, (7 U.S.C. 612(c)) as follows:

§ 612c. * * * (1) encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation or by payments to producers in connection with the production of that part of any agricultural commodity required for domestic consumption; (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal

Many of the Corporation's activities are required to be carried out by specific Congressional enactments. For example, price support loans were made mandatory as to certain designated basic commodities.⁹ Also, price support through loans, purchases, or other operations as to the so-called "Steagall commodities" was required.¹⁰ The price support of "other" commodities was optional, dependent upon the need and the funds available. Congress stated:¹¹

(b) It is declared to be the policy of the Congress that the lending and purchase operations of the

channels of trade and commerce or by increasing their utilization through benefits, indemnities, donations or by other means, among persons in low income groups as determined by the Secretary of Agriculture; and (3) reestablish farmers' purchasing power by making payments in connection with the normal production of any agriculture commodity for domestic consumption. Determinations by the Secretary as to what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption shall be final.

Docket OC-95a (Plaintiff's Exhibit 5, p. 5) proposing the Department's initial price support operations for the raisin industry in 1947, specified that part of the 1947 crop raisins to be purchased were to be disposed of by "Sales to Section 32," in other words, were to be financed through such funds and disposed of by the Secretary of Agriculture pursuant to that section.

Shields and Shulman, "Federal Price Support for Agricultural Commodities, 34 Iowa Law Rev. 188, 205-206 (1949)," in their discussion of the "Means of Carrying out Price Support Operations" list and discuss the Commodity Credit Corporation and Section 32 as the two principal means available to the Secretary of Agriculture for carrying out price support operations. (The "means" are not to be confused with the methods of providing price support such as "loans, purchases, payments, other operations, or any combination of these methods." *id.*, 200.)

⁹Section 8 of the Stabilization Act of 1942, as amended (50 U.S.C. App. 968), and the Act of July 28, 1945 (7 U.S.C. 1312, note).

¹⁰Section 4(a) of the Act of July 1, 1941, as amended (15 U.S.C. 713a-8(a)).

¹¹See 15 U.S.C. 713a-8(b).

Department of Agriculture (other than those referred to in subsection (a)) shall be carried out so as to bring the price and income of the producers of non-basic commodities not covered by any such public announcement to a fair parity relationship with other commodities, to the extent that funds for such operations are available after taking into account the operations with respect to the basic commodities and the commodities listed in any such public announcement and the ability of producers to bring supplies into line with demand.

In summary, it seems evident that CCC price support programs had a public purpose—to preserve purchasing power—to afford incentives for production—to help stabilize the general economy. Now, let us examine the raisin industry, and the CCC's activities in relation thereto, to determine whether CCC was engaged in a price support program or in a private, commercial and non-public operation.

The problem of surplus production in the raisin industry existed prior to World War II. Both the State and Federal Governments had attempted to help the industry solve the problem. See *Parker v. Brown*, 317 U.S. 341 (1943); and *Brown v. Parker*, 39 F. Supp. 895 (S.D. Calif. 1941). Prior to World War II there had been an active and important export trade in raisins, averaging upwards of 60,000 tons per year, but the war had left most European countries so impoverished as to be in a poor position to buy raisins (R. 476-477). During World War II, the problem was one not of surplus but of stimulation of grape production and the channeling of the grapes into raisin production for use as food for war purposes, to the exclusion of other peacetime

uses such as crushing for wine production. The industry was controlled at all levels of production, pricing, and distribution (R. 474; *Gray v. Commodity Credit Corporation*, 63 F. Supp. 386 (S.D. Calif. 1945), affirmed, 159 F. 2d 243 (C.A. 9, 1947)).

When price and allocation controls ended in the summer of 1946, buyers for the wineries on the one hand and the raisin packers on the other rushed into the market competitively, long before the crop was "made", bidding prices to the growers for the relatively small crop up to a peak of \$330 per ton and an average price of \$312 per ton (R. 475).

In the summer of 1947, the Department of Agriculture, as an incident of its continuing study of agriculture and under the added stimulus of inquiries and requests from growers and others, began to consider what action, if any, it should take to assist the industry to dispose of an anticipated surplus of raisins. It was expected by the Department that the packers would approach the 1947 marketing season on a reserved and cautious basis since the price for packaged raisins had declined from 22 cents per pound (November 1946) to 11 cents per pound (July 1947) (R. 476). Both the Secretary of Agriculture and the Board of the Commodity Credit Corporation also approached the problem with care, desiring to keep activity by the Federal Government to a minimum in the belief that the industry should be primarily responsible for the solution of its problems (R. 356-357; Plaintiff's Exhibit 4).

The Department had concluded tentatively in the summer of 1947 that a substantial surplus of 1947 crop raisins was to be expected on the basis of current production and marketing expectations. Such an estimate at that time in the crop year involved considerable un-

certainty, however, in that it required a guess as to what the total grape crop and the various effective demands would be. The tentative estimate was that the surplus might be as high as 100,000 tons or even more (R. 482) out of a total estimated crop of 325,000 tons (R. 157). Experience had been that such advance prediction might vary widely from what actual production and surplus turned out to be (R. 482-483).

Nevertheless, recognizing the probable disaster if the market were left without Government support, CCC prepared a docket in August 1947 identified as "*Dried Fruit Price Support Program OC-95a*" (Plaintiff's Exhibit 5).¹² It provided for the purchase of a maximum of 133,000 tons of dried fruit, and its purpose was stated as follows:

This docket has been prepared and approval is requested in order that the Department may be in a position to assist the industry during the period of readjustment from the expanded levels of production required during the war and to offset the reduction in export markets resulting from the war, by affording the necessary price support to such fruits during the period of adjustment.

The tentative nature of the initial program was made clear:

The purchase of approximately 78,000 tons of

¹² As heretofore indicated (p. 13; see also R. 362-363, 479), there are various methods of price support. A price support program may be an undertaking by the Department of Agriculture to underwrite the price of a particular commodity at a specified level by purchases or loans, or it may take the form of a surplus removal operation, which seeks to achieve a desired price level by removal of portions of the available supply from the usual commercial channels, leaving market forces to determine the price of the balance of the supply (R. 480-481; and see 15 U.S.C. 713a-8(b)).

dried apples, dried peaches, dried prunes and raisins, is expected to have stabilizing effect on the market prices for these fruits if commercial exports exceed 100,000 tons. An additional contingency purchase of 55,000 tons of dried prunes and raisins, by Commodity Credit Corporation (making a total purchase of 133,000 tons), is proposed to provide against the eventuality that such exports will be restricted to the point of causing burdensome carry-over stocks and thus defeating the purpose of the program.

Under present conditions it is extremely difficult to evaluate the price effects attributable to changes in the current surplus situation. It is estimated that, in the absence of any Government price support program for raisins, raisins made from the 1947 grape crop may average somewhere below \$100.00 per ton.

Disposition of the purchased fruit was provided for:

Dried fruits acquired in accordance with this program will be received by or for the account of CCC and disposed of by sale, pursuant to existing legislation, and by such other legal means as may be prescribed by the Administrator or his designee, as follows:

(a) Sales to Section 32, and to United States Government agencies other than for export.

(b) Sales for export, to foreign Governments and their purchasing agents; to United States Government agencies for foreign relief feeding; to public international organizations like the United Nations; to private domestic exporters; and to foreign importers.

(c) Sales in domestic commercial channels for human food consumption. Such sales shall be made only in the event the Administrator or his designee determines that such sale can be made without depressive effect upon the domestic commercial market for the dried fruits involved in such sale.

(d) Sales in domestic commercial channels for disposal other than as human food. Such sales shall be made only in the event that the dried fruits so to be sold have become damaged to such extent that they are unfit for human consumption.

The program was not calculated to produce income for the Government as the docket indicated:

The abnormal financial conditions in foreign dried fruit markets, which is the basis for the proposed contingency purchase, and, in part, the basis for the other phases of this program, prevents evaluation at this time of the final financial balance of the program. On the basis of present conditions, the net loss, if any, appears unlikely to exceed \$12,000,000.

The Acting Solicitor stated that the docket was legally authorized by virtue of certain general statutes,¹³ which were designed to stabilize farm prices and to remove surplus commodities (Plaintiff's Exhibit 5, letter of August 26, 1947).

With respect to raisins the program contemplated a

¹³ The statutes cited by the Solicitor authorizing the price support program were as follows: 15 U.S.C. 713a-8(b) (See p. 14, *infra*). 15 U.S.C. 713 (Supp. V) authorized continuance of CCC until June 30, 1948; 50 U.S.C. 1630(c) authorized the sale of surplus farm commodities in foreign markets and in the United States under certain prescribed conditions.

maximum purchase of 61,000 tons, but did not fix a price. The docket stated:

Even in the absence of announced Government purchase prices, the removal of the most price-depressing segment of the supply of dried prunes and raisins will enable the industries concerned to establish prices commensurate with the supply remaining and with the market demand corresponding to it. Under such condition, the accumulated marketing experience of the entire groups of producers and packers is used to establish the price levels necessary to move available supplies into prompt consumption instead of using the vastly more limited knowledge available to the Government to establish arbitrary price levels intended to have the same effect.

As the lower court stated, "The Department of Agriculture hoped that the general purchase program would enable dried fruit growers and processors to establish prices at a fair level," (R. 52; also see Plaintiff's Exhibit 4). The "fair" or "reasonable" (Plaintiff's Exhibit 4) level at which the Department was aiming was \$125-\$135 per ton for the natural raisins (R. 448, 578-579). The growers on the other hand were aspiring to the parity level provided for some other farm products, which would have meant a grower price of \$150-\$160 per ton (R. 204, 354, 527, 541, 573).

Following the public announcements of the contemplated dried fruit purchases, The Company submitted offers and executed contracts (Plaintiff's Exhibits 10-12, 15, 16) whereby it became obligated to furnish 14,000 tons of packaged raisins to CCC at a fixed price. These contracts contained in their captions the heading

“Dried Fruit Price Support Program.” To break even on its contracts The Company alleges that it would have had to buy natural raisins from the growers at \$110 per ton.

The market price of natural raisins at the time of the announcement of the program was not stable. Such 1947 raisins as were then being sold commanded approximately \$125 per ton (R. 502, Defendant's Exhibits K, N, p. 15). However, there were practically no sales, and for the few transactions recorded, prices declined gradually until reaching \$110-\$115 per ton in early October (Defendant's Exhibit K). The growers were in violent revolt against the prices being offered by the packers, and it soon became evident that the prices offered were not either reasonable or stable. Consequently, CCC modified its program from time to time as circumstances warranted. On October 14, 1947, the Department of Agriculture publicly announced Amendment 1 to Docket OC-95a stating that offers would be made to purchase an additional 60,000 tons of Thompson seedless raisins. On October 17, 1947, CCC by Amendment 2 to Docket OC-95a permitted the purchase by CCC of raisins in their natural condition from growers or processors. On November 26, 1947, the Department of Agriculture modified the program further by requiring all packers thereafter selling Thompson seedless raisins to CCC to certify that they had paid the growers not less than \$135 per ton (Plaintiff's Exhibits 5, 25; Defendant's Exhibit R).¹⁴ It is this program and these

¹⁴ Docket OC-95a was further amended from time to time as conditions warranted:

a. On November 26, 1947, by Amendment 4 the maximum quantity of dried prunes was increased to 86,000 tons, and the total quantity of dried fruit was increased from 193,000 to 213,000 tons.

modifications which appellee argued and the Court found to be a "purely proprietary function." (R. 59).¹⁵

The District Court's conclusion is not supported by the evidence or any legal authority known to this appellant, and, we believe, is manifestly in error. Disputes concerning the nature of certain Governmental acts—whether sovereign or proprietary—have been productive of much litigation. For example, it has been held that cities engaged in operating utilities,¹⁶ airports,¹⁷ street railways,¹⁸ public parks¹⁹ and in furnishing harbor pilots²⁰ are acting in their proprietary

b. On December 23, 1947, by amendment 5 the purchase of 5,000 tons of golden blanchéd raisins was authorized.

c. On April 21, 1948, by Amendment 6 the maximum quantity of dried fruit to be purchased was increased from 213,000 tons to 283,500 tons, and the Production and Marketing Administration was given discretion to determine the type and quantity of dried fruit to be purchased.

¹⁵ The District Court stated: "The basis of liability is real and compelling. The CCC adopted an unconscionable and wholly indefensible position, while it engaged in a purely proprietary function. *Amoskeag Mfg. v. United States*, 84 U.S. 592. It is not enough to say that CCC as an agency of the United States government was entitled to sovereign immunity. The doctrine of sovereign immunity is not applicable to the facts at large and cannot afford a defense." In the case of *Amoskeag Mfg. Co. v. United States*, *supra*, plaintiff contracted to sell carbines to the Government, delivery to be made within six months. The Government made changes in the specifications which made performance in the contract time impossible. The court held that by making the changes in the specifications there was an implication that an extension of time would be granted. This case does not appear to have much bearing on the distinction between sovereign and proprietary acts.

¹⁶ *Austin v. Mayor * * * of Union Beach*, 160 Atl. 318 (N.J.).

¹⁷ *Ex Parte Houston*, 224 Pac. 2d 281 (Okla.).

¹⁸ *Kornahrens v. City of San Francisco*, 196 Pac. 2d 140 (Cal.).

¹⁹ *Williams v. City of Longmont*, 129 Pac. 2d 110 (Colo.). But see *Honaman v. City of Philadelphia*, 185 Atl. 750 (Penna.).

²⁰ *General Petroleum Corp. v. Los Angeles*, 70 Pac. 2d 998 (Cal.).

capacity, whereas the operation of swimming pools²¹ and art galleries,²² schools²³ and slum clearance²⁴ and the lighting of streets²⁵ are Governmental functions. If the activity is for profit and is ordinarily engaged in by private individuals, it is generally classified as proprietary in nature. However, if it is not for pecuniary gain, but is undertaken for the common good, it is classified as Governmental in nature.²⁶

It may have been this principle that the District Court had in mind in finding that the acts complained of were "purely proprietary." However, this rule relates only to municipal corporations and has no application to the activities of the Federal Government. The Federal Government is sovereign and all of its acts are Governmental in nature, even though performed by federal agencies and instrumentalities. See *Cherry Cotton Mills v. United States*, 327 U.S. 536.

In *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941), the Supreme Court in holding that the lending function of a federal agency was sovereign, not proprietary, in nature stated:

The argument that the lending functions of the Federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily

²¹ *Shoemaker v. City of Parsons*, 118 Pac. 2d 508, 511 (Kan.). But see *Griffin v. Salt Lake City*, 176 Pac. 2d 156 (Utah).

²² *Burnett v. City of San Diego*, 273 Pac. 2d 345 (Cal.).

²³ *Daskiewicz v. Board of Education of Detroit*, 3 N.W. 2d 71 (Mich.).

²⁴ *State v. City Council of Helena*, 90 Pac. 2d 514. (Mont.).

²⁵ *Millard v. Milford*, 276 N.W. 826 (Pa.).

²⁶ *Daskiewicz v. Board of Education of Detroit*, *supra*.

follows that any constitutional exercise of its delegated powers is governmental. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. *Pittman v. Home Owners Loan Corp.*, 208 U.S. 21, 32; *Graves v. New York ex rel. O'Keefe*, *supra*, 477.

The federal land banks are constitutionally created, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions, the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank v. Priddy*, 295 U.S. 229, 231; *Federal Land Bank v. Gaines*, 290 U.S. 274, 254.

The Supreme Court in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-384 (1947), emphatically repudiated the contention that the Department of Agriculture's crop insurance operations through the analogous Federal Crop Insurance Corporation were subject to the same principles of liability as if the corporation were a private insurance company, saying:

It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over

a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.

It is also equally well established that the Government is not liable for damages resulting from the performance of its sovereign functions. In *Deming's Case*, 1 C. Cls. 190, 191, a change in the legal tender act was held to be a sovereign act. The court said:

A contract between the government and a private party cannot be *specially* affected by the enactment of a *general* law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the Government entering into a contract, stands not in the attitude of the government exercising its sovereign power of providing laws for the welfare of the state. The United States as a contractor are not responsible for the United States as a lawgiver.

In *Jones & Brown's Case*, 1 C. Cls. 383, 384-385, the withdrawal of troops was held to be a sovereign act. The court stated:

In the recent case of *Deming against the United States* this court decided that a contract between the Government and an individual cannot be affected specially by a general law. That principle

we now reiterate and extend to the case before us. The “obstructions” and “hindrances” complained of on the part of the United States were the withdrawal of their troops from the military posts in the Indian country, contrary to the terms of the Indian treaties; and it is insisted, “as a matter of law,” that “the United States could not change their *attitude* or their *policy* in a material degree, “without incurring the responsibility of making the claimants just compensation for all additional expenses thereby incurred.” (Emphasis supplied)

In *Grant v. TVA*, 49 F. Supp. 564 (D.C. Tenn.), plaintiff's crops were damaged by flood waters, and the court held that TVA was not liable for damages resulting from its sovereign function of promoting navigation and controlling floods. In *Commonwealth Finance Corp. v. Landis*, 261 F. 440 (D.C. Pa.), the Emergency Fleet Corporation was held not liable in damages when engaged in matters of a military nature where it was acting for the general welfare and protection of the people.²⁷

The fact that the Government in a sovereign capacity interferes with the performance of a contract made by the Government does not alter the rule of non-liability. In the leading case of *Horowitz v. United States*, 267 U.S. 458 (1925), Horowitz made a contract to buy

²⁷ Other activities held to be of a sovereign nature were the regulation of military traffic, *Hallman v. United States*, 68 F. Supp. 204 (C.Cls.), the acts of the Wage Adjustment Board, *Kirchhoff v. United States*, 102 F. Supp. 770 (C.Cls.), the priority system, *Clemmer Construction Co. v. United States*, 71 F. Supp. 917 (C.Cls.), and Government price control, *Piggly Wiggly Corp. v. United States*, 81 F. Supp. 819 (C.Cls.). Cf. *New York v. United States*, 326 U.S. 572.

silk from the Army, the Army agreeing to ship in a specified period. Horowitz resold the silk and gave shipping instructions to the Army. The silk, however, was not shipped by the Army, because the Government, acting through the United States Railroad Administration, had placed an embargo on silk shipments. The price of silk fell and Horowitz lost his resale. The Supreme Court upheld the Court of Claims finding that Horowitz could not recover, saying:

It has been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming v. United States*, 1 Ct. Cls. 190, 191; *Jones v. United States*, 1 Ct. Cls. 383, 384; *Wilson v. United States*, 11 Ct. Cls. 513, 520. In the *Jones Case*, *supra*, the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other.

Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons

In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may

work injury to some private contractors, such parties gain nothing by having the United States as their defendants.” (p. 461)

In *Froemming Bros. Inc. v. United States*, 70 F. Supp. 126 (C. Cls.) the Government contracted to furnish materials to plaintiff. The Government breached the contract by not making timely deliveries, due to the fact that the military had diverted the materials to war purposes. The plaintiff sued, and recovery was denied.

Nor is the rule changed because the sovereign interference takes the form of competitive contracts. In *Standard Accident Inc. Co. v. United States*, 59 F. Supp. 407 (C. Cls.), the alleged hindrance or interference was the result of the award of cost-plus fixed-fee contracts to other contractors in the contract area, as a result of which the contractor’s labor force was drawn to the cost-plus contract projects, increasing the plaintiff’s cost of performance. The court in disallowing the claim for increased costs said (p. 409):

The allegation of the petition that “It was contemplated and understood that the Government would do nothing which would interfere or prevent the orderly and contemplated method of performing the contract” of September 14, 1940, cannot be taken as an allegation of fact well pleaded and admitted for the purpose of the demurrer that it was contemplated and understood by the United States *that it would not enter into such other contracts as might be deemed necessary to carry out and fulfill the requirements of existing acts of Congress making provisions for the Na-*

tional Defense. * * * *the contract in suit contains no express stipulation or warranty that contracts on a cost-plus fixed-fee basis would not be made if necessary, and none can be implied.* Both parties knew of the existence of the National Defense and Appropriation acts of June 28, July 2, and September 9, 1948, and it must be assumed that in making the lump-sum contract of September 14, 1940, they knew also that the carrying out of those acts by contract, or otherwise, would be a sovereign act and not a breach of the contract then being made. Under the terms of the contract in suit, the contractor assumed the risk of meeting the changed conditions of which complaint is now made. (Emphasis supplied.)

Also see: *United States v. Beuttas*, 324 U.S. 768 (1945), reversing *Beuttas v. United States*, 60 F. Supp. 771 (C. Cls.).

In the instant case, the act complained of was a change²⁸ in the price support program, accomplished through purchase contracts intended to remove the balance of the surplus. That a price support program is of a sovereign nature seems self-evident. (See *United States v. Turlock Dehydrating & Packing Co.*, 116 F. Supp. 822, 838 (D.C. Cal.)). The program is not for profit, but is actually supported by public funds. It is not the type of activity which would be engaged in by an individual. It is public and general since its goal is to raise the general level of prices of a farm product. Even appellee must have recognized

²⁸ Appellee participated in the changed program, contracting to sell an additional 2,000 tons of raisins to CCC in November (Defendant's Exhibit AA).

the sovereign nature of the price support program, for during the trial, and in its proposed findings of fact, the term "price support" was studiously avoided, appellee doggedly sticking to the term "purchase program".²⁹ Although the District Court adopted appellee's proposed findings, in its opinion the Court recognized the true nature of the program. The Court said (R. 51):

As the federal foreign aid program diminished following the war and the Armed Forces returned to this country and were discharged, the wartime stimulated raisin industry found itself without a ready market for a large part of its product. *Government action appeared to be necessary to save the raisin grower. * * * The Department of Agriculture hoped that the general purchase program would enable dried fruit growers and processors to establish prices at a fair level.* (Emphasis supplied.)

At R. 57 the Court stated that the press release "culminated efforts on the part of all parties to stabilize the raisin market."

In any event, the docket³⁰ and the testimony (R.

²⁹ Although Grady, official in the Company, and principal witness for appellee, and appellee's counsel repeatedly referred to the program as a purchase program, even Grady when off-guard made statements conceding that the objective of the program was price support (R. 171, 177, 248).

³⁰ The docket states that its purpose is to afford "*necessary price support * * ** during the period of adjustment" (Plaintiff's Exhibit 4 p. 2). The amendment which is the subject of this litigation increased the maximum raisin purchase to 126,000 tons, "if * * * such action would be required in order to carry on successfully the *price support program*" (Plaintiff's Exhibit 4, Amendment 1 to Docket OC-95a).

355, 357, 362-363, 480-481, 530) make it clear that price support was the object of the program³¹ and that the money used came from funds appropriated by Congress for price support (R. 428).

Summarizing, the courts have consistently held that the Government is not liable in damages for its public and general acts, and price supports, along with minimum wages and protective tariffs, are parts of a legislative program designed to stabilize the domestic economy, not only for general welfare purposes, but to withstand demands made upon the economy in the support of our national defense and our foreign policy. The changes in the price support program being sovereign acts, appellant is not liable in damages unless there was a contract to reimburse appellee for such damages; and this brings us to the next issue.

II

There Was No Breach of An Implied Contract

Although the activities of the sovereign are Governmental in nature, and therefore, clothed in sovereign immunity, it is also true, of course, that the sovereign may and frequently does waive its immunity. Thus, under the Tucker Act the sovereign may be held liable for breach of contract, and under the Federal Tort Claims Act, for certain torts. The present action is based upon alleged breach of contract, and necessarily rests upon the assumption that although the changes in the price support program were of a sovereign character, CCC contracted to compensate The Com-

³¹ The Governmental nature of the program is further suggested by the proposed usage of the Governmental purchased raisins for school lunches, foreign relief, the armed forces, and eleemosynary institutions (R. 357, 478).

pany for any damages which resulted from such sovereign acts. CCC made no express agreement for compensation and the District Court's judgment does not rest on any such base. The court ruled (R. 58):

It was implied in the very nature of the transaction that the CCC would do nothing to prevent or hinder performance on the part of the plaintiff. (Citing *United States v. Peck*, 102 U.S. 64; *Cf. Baily v. Railroad Co.*, 84 U.S. 95; *Merriam v. United States*, 107 U.S. 437, 444.) The drastic and radical departure of the government policy constituted a breach of the implied agreement with plaintiff. (Citing *Fuller Co. v. United States*, 69 F. Supp. 409; also *Sunswick Corp. v. United States*, 75 F. Supp. 221.)

The liability based on an implied contract could conceivably rest on two premises: (1) That by entering into contracts of purchase, CCC impliedly agreed to refrain from any action which would increase The Company's cost of performance; that CCC's amended program increased The Company's cost and appellant is liable therefor. (2) That the press release of September 5, 1947, and/or statements made by CCC officials constituted a promise by CCC to prospective vendors that the purchase of 1947 crop raisins would be limited to 61,000 tons, from which promise it can reasonably be implied that in the event of a change in program, CCC would compensate vendors for whatever damage was caused thereby.

The District Court's legal theory of liability is not entirely clear to appellant. Therefore, we shall briefly examine both possibilities.

As to the Implied Contract Not to Hinder Performance

It is true that contractors are obliged to cooperate (42 Col. L. Rev. 903), but the rule of cooperation does not prevent a buyer from entering into a competitive market. The Restatement of Contracts, Sec. 315, in illustrating this point gives the following example:

3. A contracts to sell and B to buy in the future a large quantity of Georgia pine. Before the time for performance B makes large purchases of Georgia pine from other parties, thereby making it more difficult for A to fulfill his contract. B has not committed a breach of contract. Risk of such hindrance as has occurred was assumed by A. If B's purpose in making other purchases was to corner the market, or otherwise hinder performance in ways or for purposes not within the risk assumed, he would have committed a breach.

In regard to this point, Williston states, (Contracts. Rev. Ed. Sec., 1293A, p. 3688):

An exception to this principle must be made where the hindrance is due to some action of the promisor which under the terms of the contract or the customs of business he was permitted to take. Thus, if a party seeking to secure all the merchandise of a certain character which he could, entered into a contract for a quantity of the required goods, and subsequently made performance of the contract by the seller more difficult by making other purchases which increased the scarcity of the available supply, his conduct would furnish no excuse for refusal to perform the prior con-

tract. An interesting comparison with such a case is suggested by several cases where one, owning a play subject to a contract to pay another a share of the profits from its production on the stage, sells to a moving picture company the right to produce a "talkie," thereby rendering slight the chance of profit from production on the stage. The hindrance was held a breach of implied duty. It was not a risk naturally and properly to be anticipated. [Williston on Contracts (Revised Edition), sec. 1293A, p. 3688.]

Corbin on Contracts (Sec. 947) declares that "where prevention or hindrance was reasonably necessary in carrying on a party's other business * * * and * * * which both parties contemplated the possibility of * * * when the contract was made" there is no implied contract.

The scope and effect of this rule can best be illustrated by reference to specific cases. In *United States v. Fidelity & Deposit Co. of Maryland*, 152 F. 596 (C. A. 2), it appeared that one Conklin had two contracts with the Government. One was to remove stone from a quarry leased by the Government, and the other was to furnish stone for construction of a Government breakwater. Conklin was using the stone taken from the leased property for the breakwater, as the Government knew. Nevertheless, the Government allowed its lease to expire, and Conklin alleged that this act released him from his obligation to furnish stone for the breakwater. The court stated (p. 599):

The rule is elementary that where the parties have deliberately put their engagement in writ-

ing * * * the writing is presumed to contain the entire contract, and all the prior and contemplated regulations are merged therein, and cannot be shown by parol evidence. The writing, it is true, may be read in the light of surrounding circumstances in order more perfectly to understand the meaning and intent of the parties
* * *³²

The contract was unambiguous, and the court below erred in making a contract between the parties by parol evidence which obligated Conklin to furnish the particular stone which he had contracted to purchase from the government, instead of any other stone which might be of the quality of the sample submitted with his bid. * * *

* * * * *

We have not overlooked the case of *United States v. Peck*, 102 U.S. 64 * * *. If it encroaches upon the rules to which we have adverted, its authority ought not to be extended to cases in which the facts are not practically identical.

In *Megan v. Updike Grain Corp.*, 94 F. 2d 551, (C. A. 8), cert. denied, 305 U.S. 663 (1938), Megan, the trustee in bankruptcy for the Chicago and Northwestern Railroad, sued to recover unpaid rental on a grain elevator in Omaha, Nebraska, leased to the defendant, and owned by the railroad. The defendant pleaded frustration, based on the fact that when the lease was executed the railroad rates encouraged the

³² In the instant case the contract provided (Art. 12): "no changes in the terms and conditions of the Contract shall be allowed unless the same have been ordered in writing by the Agency and a change in price, if any, has been stated in such order."

flow of grain into the Omaha market, but that after execution of the lease, plaintiff joined with other railroads in procuring new rate orders from the I.C.C. which resulted in the diversion of the grain from the Omaha market, making the grain elevator unprofitable to operate. The court, in overruling this defense, stated (p. 554):

The railroad cannot on this account be accused of having violated the lease by making the lessee's obligation more burdensome. These additional charges were a part of general rate increase announced by all the carriers in that territory and applied to all shippers of grain. The Northwestern R.R., as lessor of the elevator, made no express or implied promise that it would refrain from joining the other railroads in a general policy which might react unfavorably upon its lessee's business.

The movement of grain * * * varies with many factors which are as unpredictable as railroad rates, weather and crop conditions, *Government agricultural policy*, foreign markets, and general economical conditions are a few of them. *The loss of profits due to a sudden change in one of these factors is a risk assumed* * * * *in the absence of an express provision* * * * *to the contrary.* (Emphasis supplied)

The case most frequently cited in support of the "assumption of risk" rule is *Iron Trade Products Co. v. Wilkoff Co.*, 116 Alt. 150 (Pa.). The plaintiff in that case had a contract to buy 2,000 tons of a certain kind of rails from the defendant. Defendant failed to perform, alleging that plaintiff had bought the rails which defendant intended to purchase to fulfill his contract

with plaintiff. The Supreme Court of Pennsylvania upheld the trial court's ruling that the affidavit of defense was insufficient, saying:

In effect, the affidavit of defense avers the supply of such rails was very limited, there being only two places in the United States (one in Georgia and one in West Virginia) where they could be obtained in quantities to fill the contract, and that pending the time for delivery defendant was negotiating for the required rails when plaintiff announced to the trade its urgent desire to purchase a similar quantity of like rails and in fact bought 887 tons and agreed to purchase a much larger quantity from the parties with whom defendant had been negotiating, further averring this conduct on behalf of plaintiff reduced the available supply of relaying rails and enhanced the price to an exorbitant sum, rendering performance by defendant impossible. The affidavit, however, fails to aver knowledge on part of plaintiff that the supply of rails was limited or any intent on its part to prevent, interfere with, or embarrass defendant in the performance of the contract; and there is no suggestion of any understanding, express or implied, that defendant was to secure the rails from any particular source, or that plaintiff was to refrain from purchasing other rails; hence it was not required to do so. The true rule is stated in *Williston on Contracts*, p. 1308, as quoted by the trial court, viz.:

“If a party seeking to secure all the merchandise of a certain character which he could, entered into a contract for a quantity of the required goods, and subsequently made performance of the contract by the seller more difficult by making other purchases

which increased the scarcity of the available supply, his conduct would furnish no excuse for refusal to perform the prior contract."

Mere difficulty of performance will not excuse a breach of contract. *Corona C. & C. Co. v. Dickinson*, 261 Pa. 589, 104 Atl. 741; *James v. Scott*, 59 Pa. 178, 98 Am. Dec. 328; 35 Cyc. 345. Defendant relies upon the rule stated in *United States v. Peck*, 102 U.S. 64 26 L. Ed. 46, that—

"The conduct of one party to a contract which prevents the other from performing his part is an excuse for nonperformance."

The cases are not parallel. Here plaintiff's conduct did not prevent performance by defendant, although it may have added to the difficulty and expense thereof. There is no averment that plaintiff's purchases exhausted the supply of rails, and the advance in price caused thereby is no excuse. The Peck Case stands on different ground. There Peck contracted to sell the government a certain quantity of hay for the Tongue River station, and the trial court found it was mutually understood the hay was to be cut on government lands called "the Big Meadows," in the Yellowstone valley, which was the only available source of supply, also that thereafter the government caused all of that hay to be cut for it by other parties, in view of which Peck was relieved from his contract.

These cases indicate that courts will not circumscribe the normal activities of a contracting party which may hinder the other party's performance, unless the evidence reasonably leads to a conclusion that the defendant had *agreed* so to limit his activities.

The proof of such a promise, be it express or implied, must rest on fact—not merely equitable considerations. *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212, 217; *Hales v. United States*, 113 F. Supp. 505 (Okla.); *Chicago Cold Storage Co. v. United States*, 57 C. Cls. 221, aff'd. 263 U.S. 677; *Cherrywood Apts., Inc. v. United States*, 98 F. Supp. 577 (C. Cls.).

Also analogous are the cases involving damages due to the sovereign acts of the Government. In such cases the parties have not been relieved of their contractual responsibility because of sovereign interference, the courts holding that the parties assumed the risk of such interference.³³ In *Columbia Railway and Power Co. v. City of Columbus*, 249 U.S. 399 (1918), the street railway obligated itself to furnish services to the city for 25 years at specified rates. Subsequently, the war started and the War Labor Board increased the wages

³³ Somewhat parallel cases concern situations where expenditures were made by private contractors for the fulfillment of Government contracts. The contracts were terminated, and the contractors sued to recover their expenditures, claiming breach of an implied contract. The courts held the Government not liable. *Chicago Cold Storage Co. v. United States*, *supra*; *Hales v. United States*, *supra*. In the *Hales* case the court said:

There is nothing in the contracts * * * that either expressly or impliedly can be construed that the defendant was concerned in any manner in the cost or maintenance of an airport. * * * under such contracts the mere fact that a contractor suffers a loss in his business venture does not entitle him to recover.

In the *Chicago Cold Storage Co.* case, *supra*, the court held—

Our search for the things said or done out of which there may be erected the implication of a promise on the part of the United States to reimburse this expense is vain. * * * We find no element of obligation.

The court, in the latter case, indicated that the contractor, an experienced businessman, should have protected himself by express provisions in the contract, instead of expecting the court to strain implications out of the surrounding circumstances.

of plaintiff's employees to a point where the railway was not making money. The railway asked for an injunction against the enforcement of the ordinance which had fixed the rates and which constituted a contract between the parties. The court stated:

it is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor Board. * * * That there might be a rise in the cost of labor, * * * might reasonably have been within their contemplation when the contract was made and provisions made accordingly. * * * it may be * * * a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such.

In *Lloyd v. Murphy*, 153 Pac. 47 (Cal.), the defendant leased certain premises for the establishment of an automobile agency. The war resulted in regulations restricting the production of automobiles. This seriously curtailed plaintiff's operations. The court nevertheless held that plaintiff was liable for the rent. It stated (p. 50) that in connection with the doctrine of frustration it must be ascertained whether the risk was "reasonably foreseeable". If so, the court held that provision should have been made for such a contingency in the contract, and further that "the absence of such a provision gives rise to the inference that the risk was assumed." The court found (p. 51) that there was no proof that the risk involved was an "unanticipated circumstance wholly outside the contemplation of the parties," and further stated,

it cannot be said that the risk of war and its consequences necessitating restriction of the production and sale of automobiles was so remote a contin-

gency that its risk could not be foreseen by the defendant, an experienced automobile dealer.

Also see: *Browne v. Fletcher Aviation Corp.*, 155 Pac. 2d 896 (Cal.) ; *Frazier v. Collins*, 187 S.W. 2d 816 (Ky.), and *Thomson v. Thomson*, 146 N.E. 451 (Ill.) app. dis. 273 U.S. 638.

In the case at bar, as the subsequent discussion will demonstrate, it cannot be said that the change in program was an "unanticipated circumstance wholly outside the contemplation of the parties." Indeed, the possibility of change was patently The Company's major concern, since it was selling short.

We believe that the foregoing authorities make it clear (1) that the mere agreement to purchase a commodity from A does not foreclose the buyer from purchasing like commodities from other vendors, even though such competitive purchase results in increasing A's cost of performance; (2) that in the absence of persuasive evidence to the contrary contractors are presumed to have assumed the risk attendant upon the exercise of sovereign functions. Thus, had The Company here while in a short position sold to a private corporation, and had CCC as a sovereign then placed a large order of raisins for use of its armed forces, it seems most unlikely that The Company would be able to escape performance of its private contract by reason of the fact that the sovereign's purchase increased the market price of raisins.

Of course, if the Government in its contractual capacity prevents performance, the other party is excused from performance. *United States v. Peck*, 102 U.S. 65. This case appears to be the authority upon which the District Court in the instant action pegged its decision

and, therefore, deserves detailed analysis. There, plaintiff contracted to supply hay to an army fort. There was a mutual understanding by both the chief quartermaster (General Card) as contracting officer, and Peck that the 150 tons of hay to be cut and supplied by Peck to the Tongue River garrison in Montana territory was to be cut from the Government owned land at Big Meadows. General Card mistakenly believed there was a large quantity of hay available, although, in fact, there was actually not more than 1,000 tons. The Indians had destroyed all other sources of hay in the area. General Hazen, a post commandant in the area, under a vague telegram of instruction entered into a contract with another contractor for 1,000 tons of hay from the Big Meadows. Almost a week later General Hazen learned of Peck's contract and told his contractor to continue cutting the Big Meadows grass at his own risk. General Hazen later told General Card he didn't think Peck could comply with his contract. When Peck's man arrived at Big Meadows he found the hay being cut, and searched in vain for other hay. A number of other misunderstandings and misfortunes also existed with respect to Peck's contract. The Government withheld from the money due Peck for wood cut under his contract "over \$40,000 for the non-delivery of 150 tons of hay." 14 C. Cls. Ill.

These facts led both the Court of Claims and the Supreme Court to conclude that the Government had prevented the performance of the contract, and that Peck's default was thus excusable.³⁴

³⁴ Attempts have been made by contractors to extend this ruling to other situations involving actions which increased the cost of performance, but without success. *United States v. Fidelity & Deposit Co.*, *supra*; *Iron Trade Products v. Wilkoff*, *supra*.

Certainly the *Peck* case is not apposite. The *Peck* case was concerned with total prevention, involved violation of an express agreement, and was not a suit for affirmative relief. The instant action, if we follow the opinion of the District Court involves right to recover the increased cost of performance allegedly due to breach of an implied agreement.³⁵

Nor are the other two cases cited by the District Court in support of its proposition that the drastic change of Government policy constituted a breach of the implied agreement in point. In *George A. Fuller Co. v. United States*, 69 F. Supp. 409, C. Cls., plaintiff entered into a contract with the United States for the construction of a building. The United States was to furnish the models needed for ornamentation. The Government's delay in furnishing the models held up completion of the project to plaintiff's material damage. Plaintiff sued and recovered. This case involves simply a common instance where a promissor cannot perform until something has been done by the promisee, and the court correctly concluded that there was an implied promise by the Government to furnish the models in time to permit performance within the period specified by the court. However, this situation is not parallel to the present case. CCC was obliged to do nothing (except issue shipping orders) as a condition precedent to The Company's performance.

In *Sunswick Corporation v. United States*, 75 F. Supp. 221 (C. Cls.), also cited by the District Court, the Government expressly bound itself to pay the increased

³⁵ Two other cases cited by the District Court (*Merriam v. United States*, 107 U.S. 437, 444; *Baily v. Railroad Co.*, 84 U.S. 96) simply support the proposition that contracts may be interpreted in the light of the surrounding circumstances.

cost of wages ordered pursuant to "Executive Order No. 9250 and regulations issued thereunder." Wages were increased upon order of the Wage Adjustment Board pursuant to said orders and regulations. The court held that plaintiff was entitled to an adjustment under its contract. The court stated:

The increased wage costs for which plaintiff seeks to be reimbursed resulted not from the Government's public and general act in setting up its war-time system for controlling and adjusting wages, nor from any widespread and general application of a device created for this public purpose as a matter of national policy, but rather from a specific order issued on a particular job by one agency of the Government, to wit, the Wage Adjustment Board, to whom the contracting agency, the War Department, had by a provision of its contract delegated authority to modify the specifications as to wage rates. (p. 228.)

We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be non-actionable as an act of the sovereign. As shown in *Bostwick v. United States*, 94 U. S. 53, 69, 24 L. Ed. 65, the liability of the Government in such circumstances rests upon the contract and not upon the act of the Government in its sovereign capacity. (p. 228.)

This case is entirely irrelevant since in the instant matter we have no express contract to pay increased cost, but are attempting to determine if an implied agreement can be found in the surrounding circumstances.

Summarizing, we believe it incontrovertible that the mere execution of a contract to buy raisins from The Company did not impose any obligation upon CCC to refrain from buying raisins from other packers, even though such purchases might have increased the market price of raisins. The District Court, as we read its opinion, did not appear to predicate liability on any such notion of implied obligation. The Court's conclusion apparently rests upon the issuance of the press release, and the purported representations contained therein.

This brings us to the major issue of the case, to wit, was there a promise made by CCC to limit its purchase to 61,000 tons of raisins, upon which promise the packers relied to their damage?

As to CCC's Promise to Limit the Purchase of Raisins

The material facts may bear repeating at this point. CCC formulated a price support program which had for its purpose the removal of a substantial portion of an estimated dried fruit surplus, including raisins, and the subsequent realization of a stabilized market price of approximately \$125-\$135 per ton for raisins. CCC adopted a dried fruit docket which provided for the purchase of 61,000 tons of raisins, out of an estimated crop of 325,000 tons of which it was believed that only 225,000 tons could be absorbed in the competitive domestic market. The Secretary of Agriculture announced this program on September 5, 1947 by a press release issued in Albuquerque, New Mexico. The market did not respond as anticipated. The raisin growers refused to sell their crop at prices which were being offered by the packers and subsequently CCC amended its program by providing for the purchase of an additional 60,000 tons of raisins from either growers

or packers and by a further provision that packers selling to CCC *after* November 26, 1947, certify that they had paid the grower a minimum of \$135 per ton.

The Company, probably the largest independent packer in California, had entered into contracts to furnish CCC 14,000 tons of raisins which contracts were executed before the program modifications were announced. The contracts are in the record as plaintiff's Exhibits 10 and 15. In their essence, they provided for: (1) Purchase by the CCC of 14,000 tons of raisins; (2) delivery of this tonnage in specified periods; and (3) payment for tonnage at agreed prices. There were also other terms relating to shipping points, carrying charges, quality, containers, markings, inspection, etc. The contracts did not contain any reference to the press release of September 5, 1947, or any statement or suggestion that the Government's purchase program would be limited to a certain quantity, nor is there any language of any description in the contracts from which such a limitation can be reasonably implied.

At the time of entering into the contracts, The Company did not have the raisins on hand to furnish the Government, but sold short in the expectation that prices would drop to a level which would permit them to perform the Government contracts without loss, (and probably with great profit). The Company contends that the second entry of the Government into the market strengthened prices and by reason thereof the raisins supplied to the Government cost The Company more than they would have cost had the Government adhered to its program as first announced.

After reviewing the factual background, the District Court stated (R. 58):

Defendant suggests that plaintiff assumed the risk of a change in the government program. This is a misapplication of the doctrine of assumption of risk. The parties did not, nor could they, contemplate the possibility of government hindrance or interference with the raisin purchase program as outlined in the September 5th announcement.

First, let us analyze the statement that The Company could not have assumed the risk of a change in the program. This involves consideration of (1) the risks inherent in the price support operation (for if The Company knew or should have known of the possibility of a change in program, the risk was necessarily assumed); and (2) the factual representations made by CCC and allegedly relied upon by The Company.

The Inherent Risk

The announced objective of the program was to achieve prices which would be fair to both producer and consumer,³⁶ and the press release so stated. The program was not, as The Company knew, for the benefit of the packers (R. 171, 496). CCC at the time of formulating its plan had to rely on estimates of crop, domestic and foreign requirements, etc. It had no way of knowing whether the plan initially formulated would bring stabilized and fair prices. In view of these facts, known to The Company, how could it assume that the program, as initially formulated, would be rigidly adhered to, particularly in a year of transition.³⁷

³⁶ Plaintiff's Exhibit 4, and Smith had told the packers the Government would not let prices go to "pot." (R. 494).

³⁷ R. 359, 473, 482. In 1946 producers had received an average of \$312 per ton, due to post war demand for California wines. In 1947 prices were less than one-half this amount.

Contrary to the expectations of CCC, the program did not result in fair prices to the grower (CCC's plan was to establish a price of \$125 to \$135 per ton (R. 248, 578-579, 448, 459). According to Grady, a Company official and the appellee's chief witness, prior to the Government announcement, he believed that prices, if left alone would have dropped to \$80.00 per ton (R. 345). Following the announcement of the program, which contemplated the removal of approximately 60% of the estimated surplus, the market was "demoralized" and in "chaos" (Grady, R. 341-345, 183). In short, the plan was a failure, due, in part at least, to the packers' failure actively to enter the market (R. 410, 501).

CCC did not, as appellee now alleges it was committed to do, sit on its collective hands. CCC was charged with the duty of protecting the economy, and it quickly revised the plan to fit the exigencies of the times. Modifications from time to time increased total dried fruit purchases to 283,000 tons, instead of the 133,000 tons originally announced (Plaintiff's Exhibit 5). The record is silent as to what profit plaintiff made from this increased purchase program in other dried fruits, but as Senator Anderson pointed out, The Company was delighted with the program for prunes, since it was in a long position, but very unhappy with the raisin program because it was short. (R. 466).

Thus, we have a price support program designed for the benefit of the farmer, a program which had fallen far short of its goal, all of which was known to The Company before submitting its bid; and despite the imperative requirement of flexibility in programs of this nature, predicated as they are on a large number of variables, the District Court found that the parties did not and could not contemplate a modification. This

conclusion is beyond comprehension, unless we find some representation by CCC that there would be no change of program.

The Factual Representations

The press release stated :

Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production. The purchases will assist the industry in disposing of this expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.

The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.

Purchases of the dried fruits under the program will be made from processors and packers of dried fruits. An announcement will be issued soon inviting packers to submit offers on a portion of the quantity to be purchased.

Most of the prunes procured by the Commodity Credit Corporation will be of the 70/80, 80/90, and 90/100 sizes. Raisin purchases will be confined to the Thompson Seedless variety.

The purchase program does not provide price support at any given level, but is expected to result in reasonable prices to producers and consumers.

Department officials stated that the program should enable the dried fruit industry to complete

its plans for readjustment on a self-help basis. It was emphasized that Government purchases should not be regarded as the permanent solution of dried fruit surplus problems.

This press release was not intended as a contractual commitment by the appellant (R. 458-459, 471). Nor was it so regarded by The Company. Grady stated that the press release was merely a device for announcing the programs of the Department of Agriculture (R. 313, 316; See *Harlingen Canning Co. v. CCC*, 93 F. Supp. 45, aff'd. 193 F. 2d 176, C. A. 5). It was not "a basis upon which any commitment is made by the vendor" (R. 316); and The Company did not base its bids upon the press release but upon (1) the announcement requesting bids (Plaintiff's Exhibit 4) which announcement did not contain any reference to the press release or to the contemplated maximum purchase, and (2) upon alleged statements of Government officials that no change was contemplated in the program (R. 370, 375, 379, 383-384; Plaintiff's Exhibit 8). As a matter of fact, following the press release, Grady and other interested parties were continuously pressuring CCC to modify the program, which indicates that the press release was not regarded as a fixed contractual commitment.³⁸ A packer, Mr. Kluge, telephoned Smith following the press release to determine whether CCC would confine its purchases to the quantities set out in the press release. Smith told him that he did not know whether CCC would buy more than the quantities stated (R. 498). Then Kluge presumably relayed this to

³⁸ Despite the testimony of Anderson, Secretary of Agriculture, and Grady that the press release was not intended or believed to form the basis of a contract, the District Court found that the press release was issued with contractual intent (R. 70-71).

Grady. Grady promptly suggested that CCC modify the program and allow fixed prices under the Webb-Pomerene Act (R. 184, 500, 646; Plaintiff's Exhibit 6).

Grady also kept in touch with the contracting officer for the purpose of securing information concerning possible changes in the program (R. 193); and he talked with a Mr. Myer in the Department of Agriculture, who allegedly told him that there was little likelihood of change (R. 376, 378), thus indicating knowledge of the possibility of change.

In fact, there was no representation by any one that the program would not be changed and, in the final analysis, as Grady conceded, appellee's theory of misrepresentation rests upon a telegram sent by Smith to Grady in response to Grady's recommendation that the Webb-Pomerene Act be employed. Smith rejected Grady's proposal in the following language (R. 194, 198-199, 370, 379; Plaintiff's Exhibit 8):

In speech at Fresno August 4 and press release issued Albuquerque September 5, Secretary stated that Dried Fruit prices would not be supported at fixed level. Announcement of prices to be paid by CCC or arrangement under Webb-Pomerene act would be contrary to Secretary's statement. The program as announced is substantial contribution toward stabilized conditions within Dried Fruit Industry. We solicit and expect receive cooperation Rosenberg and other packers in making it a success.

Although Grady repeatedly referred to the wire as a representation that the CCC program would remain unchanged (R. 199), the telegram is clearly nothing more than a request for cooperation with the then an-

nounced program, and contained no statements from which a promise not to amend the program can be implied.

Following receipt of the telegram, The Company did not regard the program as rigid. The growers were continuing their violent opposition to the program (R. 204.). Grady admitted that there were rumors of a change in the program³⁹ and The Company recognized the hazards implicit in a situation, where one is selling short (R. 207). If the growers were successful in securing a change "we might be required to pay \$150 a ton for raisins" (R. 205). On September 30, Mr. Grady sent a memorandum to his superior in The Company stating (R. 311, Defendant's Exhibit B):

For what it is worth Cobarley [Corbaley] says "Agriculture seems determined not to buy dried fruit appreciably above levels established in first acceptance of bids, *but what Washington may do is always a gamble.*" (Emphasis supplied).

On October 8, Mr. Grady sent a letter to a Mr. Cooper, (Defendant's Exhibit AH) which mentioned "The uncertainty that has been engendered by the Government's purchase program and the uproar which has accompanied it and which is apparently continuing." And then said:

³⁹ R. 219-220. There was more than a rumor of change. On October 8, the docket was amended, although the public announcement by the Department of Agriculture was not issued until October 14. However, Senator Downey was informed of the change several days earlier and his prediction that there would be a change was printed in the "Fresno Bee", (Defendant's Exhibit P, Q) the leading newspaper in the same town in which The Company maintained its buying office, and which news releases, according to Senator Downey, must have come to the attention of The Company (R. 140, 141).

It is clearly evident that this continuing uproar serves as a deterrent to the trade which is unable to appraise its possible effects—*indeed, no one even here in California seems able to predict the Government's future course of operation.* Today substantially the Government “is the market” and, of course, no one is willing to entirely miss the market. (Emphasis supplied).

This evidence makes it clear that The Company was not unmindful of the right of the Government to change its policies and program, and of The Company's risks in view thereof. The short of it is that The Company consciously gambled on price fluctuations when it entered into the contract with CCC. The gamble did not pay off, and there is nothing in the evidence before this Court which would justify a finding that the Government had promised to protect The Company against a rise in price *when such rise in price was the immediate purpose of the program.*

The court might wonder why The Company would offer to sell raisins at the stipulated prices in view of the possibility of a change in the Government purchase program; and particularly, why The Company would sell short in the face of the manifest uncertainties. The answer is that at the time the Government “was the market,” and The Company did not want to miss the market (Defendant's Exhibit AH). But why did The Company bid a price *below the market?*⁴⁰ Because, as Mr. Arnold, vice-president of The Company, testi-

⁴⁰ The evidence shows that The Company's bid was based on purchases at \$110 per ton, and that on September 11, 1947, the day following Amendment No. 1, The Company was offering \$125 per ton for raisins (Defendant's Exhibit N, p. 15).

fied, Mr. Oppenheimer “made the statement that he felt that Sun-Maid would have difficulty in selling their raisins of that crop and therefore it would be apt to name a very low price, and in order for us to qualify under the bid it would be necessary for us to bid a price lower than the then prevailing market to the domestic trade”; and that he agreed with Mr. Oppenheimer (R. 586). This testimony was not contradicted, and Mr. Oppenheimer’s statement was made in the presence of a number of people whom Mr. Arnold named (R. 585).

One pragmatic test for determining the existence of a contract implied in fact is to ask the question—Had the parties given consideration to the question at issue, would they have been willing to include in the written contract the promise which is allegedly in the contract by implication? In short, would the CCC have expressly agreed to limit the program to 61,000 tons? We think the answer is not obscure. Since CCC had no way of knowing whether the contemplated purchase would achieve a reasonable price, it is inconceivable that it would have consented to any such restriction.⁴¹

Nor is it conceivable that CCC would have agreed to compensate the packers for any loss resulting from a change in program. In this connection, it should be

⁴¹ The uncertainties connected with the program, and consequent necessity of maintaining a flexible position is suggested by the history of the docket. The price support program as originally drafted contained two proposals, one, the purchase program herein involved, and the other, a subsidy program under which it was proposed to subsidize the export of an additional 80,000 tons of raisins. This subsidy program was tabled by the Board of CCC (R. 531-537). However, suppose that in October CCC reconsidered and adopted the subsidy proposal, an action which might have affected the market price, would CCC have been liable therefor?

remembered that CCC had no control over The Company's response to the invitation to bid. The Company could refuse to bid. The Company could offer to sell only that quantity of raisins already priced by the grower; The Company could offer to sell to the Government at prices which would enable it to purchase raisins from the growers at prices at which they were willing to sell. The Company could sell short at prices above, below, or at the market level. In actuality, The Company here sold short at prices below the market in the expectation that prices would drop. In view of the complete control The Company had with respect to its own course of conduct, it would be entirely unreasonable to imply that CCC had agreed to underwrite The Company's operations irrespective of the method employed. The program was an attempt to siphon off surplus and, thus, to establish a reasonable price level for raisins. It was not for the benefit of the packers, but for the farmers. (R. 496).

Furthermore, being experienced in the business (and price support has been the rule in the dried fruit industry for many years), The Company, had it desired the kind of protection which it now asks the Court to paste together out of the "surrounding circumstances," should have made provisions for compensation or other relief in the event of change. In the case of *Shedd-Bartush Foods of Illinois, Inc. v. CCC*, 135 F. Supp. 78 (D. C. Ill. 1955), which involved a suit against CCC to recover losses due to a rise in the price of tallow, plaintiff deliberately took the gamble on price changes, and the court commented, in denying relief:

There are available devices, by inclusion of escalator clauses or cost-plus-fixed-fee provisions, to

enable the contractor to shift to the government risks inherent in price changes.

The Authorities

When dealing with implied in fact contracts, it is seldom, if ever possible, to cite authorities directly in point. The decision in each case depends on the particular facts therein involved. In the instant action there is no pretense that CCC promised The Company compensation for such losses as a change in program might produce. The appellee's case, and the District Court's decision, appears to be founded upon a premise, (1) that CCC promised to limit its purchase to 61,000 tons, (2) that The Company sold short in reliance upon this promise, and (3) that CCC's promise to limit purchases carried with it an implied promise to respond in damages if the direct promise was breached. The nub of the case is, therefore, the existence of a promise to limit purchases to 61,000 tons. There is no evidence of any "representation" other than that contained in the press release of September 5, and, hence, the disposition of this case, in essence, depends upon the interpretation of that release. Was it a contractual commitment, or was it an announcement of governmental policy?

In searching out the contractual intent the courts have given short shrift to the argument that implied contracts can be spelled out of legislation and governmental policy determinations. In *Cherrywood Apts., Inc. v. United States*, 98 F. Supp. 577, C. Cls. (1951), the Government built temporary housing projects under the Lanham Act. The Act subsequently was amended to provide for the expeditious removal from the housing market of all such temporary buildings.

Plaintiff built apartments believing that the Government project would be quickly closed. However, the Government operations continued for some time. Plaintiff brought suit to recover for breach of implied agreement not to compete with private housing. The Government's demurrer was sustained. The court stated:

The various expressions of Congress were what they purported to be, acts of legislation, and not statements implying promises that governmentally constructed housing would not be permitted to compete, even temporarily, with private housing to the prejudice of the latter.

In *R. F. C. v. MacArthur Mining Co.*, 184 F. 2d 913 (C. A. 8, 1950) cert. den. 340 U. S. 943, reh. den. 341 U. S. 917, two letters written by the President of the United States and Donald M. Nelson, Chairman of the War Production Board, stated that it would be Government policy to pay prices for war metals which would yield a fair return to the producer. The plaintiff, alleging that these letters constituted an offer which it had accepted, sued to recover the alleged fair price of its product. The District Court held that the letters assured a margin of profit, and that the Government was contractually bound. The Court of Appeals reversed and stated (p. 196):

We think the court was mistaken in thus construing these letters. They purported only to announce a policy of the government, and the presumption is that they were "not intended to create private contractual or vested rights * * *," *Dodge v. Board of Education*, 302 U. S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57, and he who asserts the crea-

tion of a contract in such a case has the burden of overcoming the presumption.

* * * * *

A government “policy” does not give rise to a contract in and of itself. The announced policy does no more than to authorize the appropriate government agency to enter into a contract consistent with the policy, and in entering into a contract thus permitted the agency is bound to observe and comply with the provisions of the statutes and regulations applicable.

The refusal of the Court to restrict, by implication, the exercise of Governmental functions is well illustrated in the case of *Knoxville Water Company v. Knoxville*, 200 U. S. 22. There the plaintiff corporation entered into a contract to furnish water to the municipality for a stated period of thirty years. Before the expiration of said period, the municipality determined to operate its own water system. Plaintiff brought an injunction to prevent such competition. The court, in holding for the city cited *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 547, 548, stating (pp. 33, 34, 35):

“The Government having entered into a contract * * * is not by means merely of implications and presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such contract must operate against the adventurers and in favor of the public * * * and that it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created * * *. The authorities are all agreed that a mu-

municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings * * * It is said that the company could not possibly have believed that the city would establish waterworks in competition with its system, for such competition would be ruinous to the Water Company, as its projectors, on a moment's reflection, could have perceived when the agreement * * * was made.

It was held that—

“the stipulation in the agreement that the city would not at any time during the thirty years * * * grant to any person or corporation the same privileges it had given to the Water Company was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own.”

Also see *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U.S. 379.

In *Williams v. Wingo*, 177 U. S. 601, a statute forbade a county to establish a ferry closer than one-half mile to any other ferry. The plaintiff contended that this act was a contractual commitment, and that later acts permitting closer competition were an impairment of contract. The court held for the defendant, stating that the acts in question did not “tie the hands of legislation, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. A contract binding the State is only created by clear

language and is not to be extended by implication beyond the terms of the statute.”⁴²

In the recent case of *United States v. Binghampton Construction Co.*, 347 U. S. 171, suit was filed to recover costs of performance allegedly increased by the Government’s misrepresentation of fact, under the following circumstances. The Davis-Bacon Act provides for a minimum wage scale in Government projects based upon the wages determined by the Secretary of Labor to be prevailing. The plaintiff adopted the scale submitted by the Secretary of Labor pursuant to the Act, and then discovered that the prevailing wages were, in fact, higher. The Court of Claims gave judgment to plaintiff, holding that the schedule furnished by the Government misrepresented the facts (107 F. Supp. 712). The Supreme Court reversed, holding that the Davis-Bacon Act was for the benefit of employees of Government contractors, and that the schedule was not a contractual representation to the employer but was only intended to establish a minimum wage level.

Likewise in the instant case, the announced program—intended to benefit the grower—was not intended to commit the Government to a rigid policy, and should not be converted by this court into a contract with the packers.

Conclusion

The Company, upon learning of the CCC program

⁴² Also see: *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (1837); *Turnpike Company v. The State*, 3 Wall. 210 (1865); *West Tennessee Power & Light Co. v. City of Jackson*, 97 F.2d 979 (C.A. 5, 1938), cert. den. 305 U.S. 625; *Ohio Electric Power Co v. Village of Oberlin, Ohio*, 9 F. Supp. 469 (D.C. N.D. Ohio 1933); *Fort Smith Light & Traction Co. v. Kelley*, 94 Ark. 461, 127 S.W. 975 (1910).

to purchase 61,000 tons of raisins, made efforts to secure a modification. The Company was unsuccessful. It knew that the growers were also making intensive efforts to secure a change, and concluded that they would also fail. Believing that the price of raisins would decline sharply, The Company in response to CCC's offer to buy, sold 14,000 tons, while in a short position. The Company gambled on a supposition that the Government would not provide further price support.

The Government's action in modifying a program which was not effecting the price support objective was a reasonable exercise of its Governmental function, and is not a basis upon which liability for damages can securely rest.

III

The Appellee Has Waived the Government's Alleged Breach of Contract

The appellant has two points to make with respect to waiver:

1. That The Company's conduct in performing the contract after full knowledge of the breach and before any loss had been sustained constituted a waiver.

2. That The Company's conduct in inviting an amendment to the contract and performing the amended contract with knowledge that the Government understood the contract to be fully binding on both parties waived the alleged breach.

As to Performance after Knowledge of Breach

The contracts in question were executed on September 25 and October 14, 1947. Delivery was to be made in the period October 1947-January 1948. De-

fendant made its first call for raisins on October 16 and frequently thereafter (Defendant's Exhibits V, W, X). The Company, as previously stated, had sold short and with the market price rising made no effort to buy raisins to fulfill the Government contract (R. 63-64). As a matter of fact, The Company did not even treat the Government contracts as "sales", instructing the bookkeepers to only enter the contracts on the margin of The Company's trading book. These marginal entries were maintained until January 30, 1948, when for the first time The Company treated the contracts as an actual sale in their books (R. 322, 323, 328). In any event, The Company advised CCC that it did not have raisins available and consistently refused to furnish raisins through the period October-December 1947. The breach of contract, if it occurred, took place on October 14, October 17 and November 26, when the changes in program were announced. During that entire period The Company was only purchasing raisins for its commercial customers, the Court finding that Government purchases commenced in the latter part of December (R. 63-64). The Company had suffered no damage up to that point and would have suffered no damage at all if it had rescinded the contracts, which counsel had apparently advised The Company was its right (R. 294-295, 338).⁴³ Instead of rescinding without damage to itself, The Company undertook to perform the contract, and this action created the loss appellee now seeks to recover.

⁴³ Appellee had not purchased any raisins and had anticipated no profit on the Government contracts (R. 196, 209-210, 218, Def. Exh. 21) according to its own witnesses (appellant doubts the sincerity of such testimony as to profit, but it is binding against appellee).

It is well settled that under such circumstances the doctrine of waiver applies. *Monad Engineering Co. v. United States*, 53 C. Cls. 179; *Board of Trustees v. O. D. Wilson Co.*, 133 F. 2d 399 (D.C.A.); *Dubois Construction Co. v. United States*, 98 F. Supp. 590 (C.Cls.); *Baltimore & Ohio Railway Co. v. Jolly Bros. & Co.*, 72 N.E. 888 (Ohio); *Simon v. Goodyear Metallic Rubber Shoe Co.*, 105 F. 573 (C.A. 6); *H. E. Crook Co. v. United States*, 59 C.Cls. 593, aff'd. 270 U.S. 4, 13 A.L.R. 2d 856.⁴⁴

In *Simon v. Goodyear Metallic Rubber Shoe Co.*, *supra*, plaintiff had for many years been buying old rubber and selling it to manufacturers. An agency of defendant urged plaintiff to contract for 250 tons of rubber and, when plaintiff expressed reluctance to contract for such a large amount when he carried no stock and would have to buy in the market to fill the contract, defendant stated that a large buyer was going out of business and the price in the market would surely be lower. Plaintiff contracted to supply the rubber. In fact, there was heavy competition for rubber and the price rose. Plaintiff conceded that he learned of this activity in the market before he made his first delivery, and that he knew that the concern which defendant had represented as going out of business was in fact actually bidding. Plaintiff then finding that he could not buy to fill his contract except at a loss, made efforts by correspondence and personal

⁴⁴ Cf. *Warren v. Stoddart*, 105 U.S. 244, where the Court said, "The rule is that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

intercession, to obtain some concession in quantity or some advance in price. Failing in this, plaintiff notified defendant that he would carry out his contract, and hold defendant responsible, in an action for fraud and deceit, for the loss he might sustain. Plaintiff continued to buy and make deliveries, obtaining a concession in respect to deliveries, and received payment at the contract price, sustaining an actual loss of \$4,000. He sued.

The court in denying recovery stated (p. 579):

* * * in an action by one who has been fraudulently induced to make either a contract of sale or purchase, it must follow that if one, after full knowledge of the fraud and deceit * * * goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is *voluntarily incurred*. The maxim *volenti non fit injuria* has application to all loss resulting from the voluntary execution of a nonobligatory contract with knowledge of the facts which render it voidable.

The reason for the rule is simple equity. A party, even though aggrieved, does not have the right to take action which will serve only to cause damage to the other party. Here, if as appellee contends, there was a breach of contract which justified nonperformance, then The Company's election to perform, not the appellant's breach, created the damage. Cf. *Morgan v. McKee*, 77 Pa. 228, 231, *Leaming v. Wise*, 73 Pa. 173.

This principle of waiver was not mentioned in the opinion of the District Court, although it had been presented in the defendant's brief. The District Court stated:

With respect to the defense of waiver of rights, plaintiff's conduct at the end of January, 1948, in arranging for shipment under the contract requirements did not in itself waive any rights arising by reason of the CCC's breach. The express waiver under the January modification dealt solely with subsidiary matters of storage charges and delayed shipment. Plaintiff preserved its rights. Defendant has the burden of proving waiver (F.R.C.P. (8)(c)), and has not discharged this burden.

The series of events leading up to the final shipment of raisins indicate an effort on the part of plaintiff to renegotiate or cancel the contracts. They do not point to waiver. Delivery itself following defendant's breach does not constitute a waiver of a damage claim. (*Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F. 2d 488). Nor did acceptance of payments under the contract constitute a waiver. (*Blair v. United States*, 147 F. 2d 840).

Thus, it seems apparent that the Court only concerned itself with the question of whether The Company had consciously abandoned its right to recover damages for the alleged breach. Even here appellant submits that the Court was in error.

As to The Company's Subsequent Agreement to Perform at the Contract Price

The law is settled that if a party, following a dispute as to the price due, performs the contract, and accepts the stipulated price, he cannot then claim damages. *Early & Daniel Co. v. United States*, 271 U.S. 140; *Willard Co. v. United States*, 262 U.S. 489, *Ncl-*

son Company v. United States, 261 U.S. 17, *Savage v. United States*, 92 U.S. 382, and *Francis v. United States*, 96 U.S. 354. Also see *N.Y., N.H. & H. R.R. v. United States*, 251 U.S. 123, *White Oak Coal Co. v. United States*, 15 F. 2d 474 (C.A. 4) cert. den. 273 U.S. 756, and *P. W. Brooks & Co., Inc. v. North Carolina Public Service Company*, 37 F. 2d 220 (C.A. 4) cert. den. 281 U.S. 741.

In the *Early & Daniel Co.* case, *supra*, plaintiff claimed that for hay delivered in excess of the contract amount it was entitled to the market price. The Court said (p. 142):

The appellant had the option of delivering the remainder of the hay under the terms of the contract, or of not delivering it at all, if the contract had been broken. It chose to deliver. It made a protest, but that was ignored by the officers of the Government, and, when the Government tendered the contract price, it was accepted by the appellant and without protest.

The Court went on to say that under the circumstances there was no ground for implying a contract to pay more than the contract price.

In *Savage v. United States*, *supra*, the plaintiff insisted that it had a right to have treasury notes redeemed in gold, whereas the United States would give only legal tender notes. Plaintiff accepted the legal tender notes under protest. The Court, at pp. 385-386, stated:

* * * but the whole record shows that it was an honest difference of opinion between the secretary and the decedent as to the rights of the parties, and

that it terminated by the voluntary acceptance of the legal-tender notes on the parts of the agents of the decedent, in lieu of gold, * * *. Such an acceptance of payment was a waiver of the claim antecedently made, and amounted to a full discharge of the same, * * *.

Plaintiff's "protests * * * did not * * * qualify the voluntary acceptance of the terms proposed by the Secretary and the absolute and unconditional surrender of the securities to the United States."

Cases involving waiver,⁴⁵ estoppel and accord and satisfaction are legion—but the advantage to be gained from any extended analysis of such cases is dubious, since each case must be decided upon the particular circumstances there present. The facts of the case at bar, as briefly as it is possible to state them, are as follows:

1. The Company contracts provided for delivery, commencing in October. The Company refused to make delivery, stating that it had no raisins available for delivery to the Government. The price of raisins apparently precluded The Company from fulfilling the Government contracts except at a loss, which it was not prepared to assume.

2. In January 1948, the price of raisins declined to a point where The Company could purchase raisins and fulfill their contracts without loss, and probably with a substantial profit (App. C.). The Department of

⁴⁵ The two cases cited by the District Court (R. 60) are not contrary, standing for the proposition that upon breach of contract, the injured party may rescind or perform, and sue for damages. This rule does not have much bearing on the present issue. Furthermore, in the instant action, The Company did not continue performance. It breached the contract by refusing to make delivery in the contract period.

Agriculture on January 21, 1948, (Plaintiff's Exhibit 29) thereupon notified The Company that it expected delivery under the terms of the contract (undoubtedly acting on the belief that in view of the then existing price of raisins, The Company could perform without suffering any damage).

3. On January 22, The Company wrote to the contracting officer as follows (Plaintiff's Exhibit 30):

Please be referred to our contract A6pm(Ff)-1647 covering 6000 tons Domestic Pack and 4000 tons Export Pack Thompson Seedless Raisins.

Because of our inability to secure the raisins, due to the confused situation in the San Joaquin Valley resulting in an almost total stoppage of movement of raisins into our Fresno plant, and because of our failure to secure any relief from Washington we were unable to make delivery on shipments totaling 5,718 tons Domestic Pack and 699,990 lbs. Export Pack.

We are now in a position to make deliveries against this contract, and it is our understanding that before the Shipping and Storage Branch can instruct shipment against this contract, it will be necessary to issue an amendment reinstating this tonnage and extending the delivery date.

We will appreciate it if you will furnish such an amendment.

At the time of this letter, natural raisins were being quoted at \$105-\$110 per ton which would have enabled The Company to purchase raisins and to perform its Government contracts without loss (App. C).

4. On January 26, the contracting officer wired The Company pointing out in detail The Company's de-

faults in delivery and stating further as follows (Plaintiff's Exhibit 32):

We should like to know whether you will deliver if you receive other notices to deliver, provided that no damages for non-delivery will be sought by Commodity Credit Corporation other than the waiver by you of all carrying charges on raisins covered by Contract A6PM(FF) 1647.

Therefore, please advise us as to your intention with reference to delivering the quantities of raisins under the above mentioned contract as well as under Contract A6PM(FF) 1893.

We are willing to take delivery on all of the quantities covered by both the above mentioned contracts *at the contract prices*.

In accordance with recent advice received from Washington, D. C. *these prices will not be raised* except that the 12,000,000 pounds sold pursuant to Contract No. A6PM(FF) 1647 in domestic containers shall be packed in export containers at an increase in price of \$0.0005 per pound.

We will not pay carrying charges on any raisins covered by Contract No. A6PM(FF) 1647.

This telegram is sent without prejudice to any rights of Commodity Credit Corporation.

If this arrangement is agreeable to you please indicate your agreement therewith by advising us not later than 500 PM January 28, 1948.

Otherwise please indicate your intention as to your performing on these contracts. (Emphasis supplied)

5. The evidence shows that Grady telephoned the contracting officer on January 27 and requested the con-

tracting officer for permission to answer the telegram of January 26 with a qualification such as "without prejudice to our rights regarding our conversation with the Secretary."⁴⁶ In a conversation the next day, the contracting officer advised Grady that he could not issue shipping instructions if such a qualification were added, because any such proposal would have to be submitted to Washington for consideration. He further advised Grady that any such qualification might result in delay and would not have too much chance of being accepted (R. 605-610). This testimony of the contracting officer was supported by his contemporaneous notes (Defendant Exhibit U).

6. On January 28, The Company responded by telegram as follows (Plaintiff Exhibit 33):

Retel January 26th: This Confirms Our Agreement to Extend Period for Shipment as Outlined Your Wire. Will Appreciate Receiving Prompt Shipping Instructions—

On the same date a second telegram was sent by The Company to the Contracting Officer which read as follows (Plaintiff's Exhibit 34):

Supplementing Our Today's Wire We Are Agreeable to Conditions Your Wire For Packing 12,000,000 # Raisins in Export Containers at Price Increase of \$0.0005 Per Pound. Also it Is Our Intention to Deliver Raisins under Contract A6PM (FF) 1893.

7. After receiving the two telegrams of January 28, 1948, Mr. Allmendinger had a further telephone con-

⁴⁶ Grady had discussed The Company's situation with the Secretary of Agriculture and hoped to receive a price increase through negotiation (R. 422-423, 254).

versation with Mr. Grady on January 29, and told him that "it was possible to construe the first wire received from him on January 28th as not agreeing completely to ship and waive carrying charges on contract 1647 if the delivery notices were issued. That is he was agreeing only in part." Allmendinger suggested that this construction would not be possible "if a wire was sent stating that if delivery notice is issued against fruit covered by 1647, Rosenberg agreed to ship such fruit and waive carrying charges, provided our telegram January 26th. Mr. Grady stated at that time that he would send a wire containing substantially that language" (R. 613).

8. Under date of January 29, Mr. Grady on behalf of Rosenberg sent Mr. Allmendinger a telegram as follows:

Pursuant our wires 28th reference contract A6pm (Ff)-1647 we confirm conversation. If delivery notice is issued against fruit covered by this contract we agree to ship such fruit and waive carrying charges as provided your wire January 26th.

9. CCC issued shipping instructions and the raisins were delivered in February and March 1948 (Plaintiff Exhibits 42, 43).

10. Rosenberg thereafter proceeded to bill the Government for the raisins delivered under the contracts, as amended, upon standard voucher forms certifying that the bills thus presented were correct and just and that "all conditions of purchase applicable to the transactions had been complied with." No reservations whatsoever were contained in the voucher forms (Defendant's Exhibit Y, which has been stipulated (R. 635-636) to be typical of all the vouchers submitted by

Rosenberg). Rosenberg accepted payment of the vouchers.

From these facts, it is necessary to determine whether The Company agreed to perform the contract at the stipulated price, thus waiving the breach. It will be noted that the contracting officer specifically agreed to accept late delivery "*at the contract prices*" (Plaintiff's Exhibit 32), and stated pointedly that the contract prices *would not be raised* except in a minor particular relating to the type of container to be employed. (Plaintiff's Exhibit 32). Further, the contracting officer rejected Grady's proposal that the reinstatement of the contracts contain a provision reserving to The Company the right to assert a claim; The Company specifically complied with the terms of the reinstatement; delivery of 14,000 tons of raisins was promptly made; The Company billed and was paid the modified contract price.

The waiver of the alleged breach, the appellant submits, follows not only from the express consideration and rejection of The Company's proposal that the modified contract reserve appellee's right to press for a higher figure, but from the fact that the Government in accepting the modification waived its right to claim damages due to non-delivery in the contract period. This constituted a new consideration for performance by plaintiff. Williston, Contracts, Rev. Ed. Sec. 135. Cf. *Bransford v. Regal Shoe Co.*, 237 F. 67 (C. C. A. 5). A contractor cannot at the same time accept the benefits of the contract and reject its responsibilities. *Nasoiy v. Tomlinson*, 42 N. E. 715 (N. Y.); *Willard Co. v. United States*, 262 U. S. 489; *American Rolling Mill Co. v. United States*, 60 C. Cls. 882, 894, cert. denied 269 U. S. 567; *Kentucky Natural Gas Corp. v. Indiana Gas*

& *Chemical Corp.*, 129 F. 2d 17, cert. den. 317 U. S. 678; *Mason v. United States*, 84 U. S. 67.

In the *Willard* case, *supra*, the Navy ordered coal and the plaintiff protested, requesting the Navy to leave the price open. The Department declined and the plaintiff furnished the coal. The court in holding the plaintiff to the contract price, stated

by the conduct and performance of the parties the contract was made definite and binding as to 110,000 tons ordered and delivered according to its terms.

In the *American Rolling Mill* case, *supra*, the Government ordered material. Plaintiff wanted payment for the inspection charges, and was told that he would not be paid. Nevertheless, he shipped the material. The court, in holding plaintiff to its contract stated:

The plaintiff therefore fulfilled the contract knowing what price the government expected to and would pay, and that it would not cover compensation for inspection. Plaintiff can recover, therefore, only the contract price, which has been paid to it.

The District Court seemed impressed with the equities in favor of The Company. We believe that the Court may not have taken note of the equities favoring CCC. Here was a price support program designed to stimulate purchases and to stabilize prices at a level not ruinous to the grower, as The Company knew. The Company instead of offering the cooperation requested, did everything in its power to beat down the price. For example: (1) It bid prices below market (R. 586), and thus, to come out even, was forced to try and defeat the program, (2) it ordered its buyers to stay

out of the market for a period of several weeks, (Defendant's Exhibit N, pp. 15-17) when ordinarily it would be buying heavily (R. 202), (3) when it did buy, it bought on open price contracts, because the prices it offered were not acceptable to the grower, and because The Company believed that competition would drive the price down (R. 204). The open price contract removes buying power from the market, and has a price depressing effect, as Smith and Arnold, former Vice President of The Company, testified (R. 523, 587-588). (4) Although the purpose of the program was to get the packers into the market, The Company did not buy any raisins for the CCC contracts until late December (R. 63-64), (and did not record the CCC contracts as sales until January 30, 1948). (5) When The Company finally agreed to deliver the season was drawing to a close, and the price of raisins had dropped to \$100-110 a ton, and remained at this level for several weeks (App. C). The contracting officer honored the CCC contracts, despite non-delivery believing that the reinstatement was at the contract price. Had The Company been forthright and rescinded the contract, the Government could have covered its commitments without additional expenditures. Instead, The Company agreed to reinstatement at the contract price, and having received full payment, filed suit. The Company, as the expression goes, wants to have its cake and eat it too. We submit that there should be no recovery.

IV

Appellee Has Not Established Any Damage

The appellee's claim is predicated on a contention that it is entitled to recover the difference between what

it paid for the raisins furnished to the Government and what it would have paid had there been no Government "interference." With this formula appellant has no quarrel. The trouble lies in its application to the instant circumstances. The undisputed and central facts are these:

*Price Paid by The Company for Raisins
Processed and Delivered to CCC*

1. Raisins are a fungible product. The packer supplying an order simply dips into the raisin bin and extracts the quantity of raisins needed. He cannot identify the raisins withdrawn as to the price paid. If he has been paying various prices for raisins, or if the raisins have been bought on open price contracts, which have not become firm, it is impossible for him to state the price paid for any lot of raisins processed and sold by him.

2. The District Court found (R. 63-64) that The Company did not purchase for the Government account until late December.

3. Raisins were costed from December through May and their delivery to the Government may have occurred before the cost was fixed (Defendant's Exhibit AC). Thus, any raisins costed December or later may have been applied to the Government contracts.

The burden of proof of establishing damages falls upon the appellee, and since appellee admittedly cannot establish the identity of the raisins furnished the Government, it must necessarily be assumed that the raisins which cost the least were supplied. Damages cannot be levied in excess of the maximum provable. *Jones' Appeal*, 62 Pa. 324; *United States v. Northern Pacific Ry. Co.*, 116 F. Supp. 277 (Minn.).

In the *Jones* case, *supra*, the court said:

Thus if plaintiff prove the delivery of goods, but gives no evidence of their value, it will be presumed that the articles were the lowest price of goods of that description.

The minimum cost paid for 14,000 tons of raisins which could have been supplied to CCC was \$116.16 per ton. Since these raisins may have been the raisins supplied the Government, this figure should be used (Defendant's Exhibit AO).

The court's figure of \$120.52 per ton is based upon data showing the average cost of 14,000 tons of raisins *costed prior to March 30, 1948*, the final delivery date (Defendant's Exhibit AO). However, *the fact that certain raisins were costed after March 30, does not mean that such raisins were not delivered to the Government*. The costing, as the record discloses, on open price contracts, may and often does take place a considerable time after delivery (R. 109, Plaintiff's Exhibit 52). Hence, the formula of minimum cost should have been used by the trial court.

As to Cost in Absence of Government Interference

The previous problem of determining the cost of raisins furnished by The Company is difficult of solution, but as indicated, a rational conclusion can be reached. The cost to The Company had there been no modification of the Government price support program, does not permit of any solution, short of wild conjecture. The court accepted appellee's figure of \$110 per ton, and in its opinion, (R. 64) leaves an inference that

this figure was agreed to by the Government.⁴⁷ Nothing could be more wide of the mark. Government counsel consistently and vigorously argued that there was no basis for The Company's assumption that the price, absent Government modification, would have settled at \$110 per ton or less (R. 662, 666, 667). The truth is that the evidence does not establish this necessary element of proof, nor can the cost be determined by reasonable inferences.

Grady testified that in view of the Government program, he thought the price would drop to \$110 per ton (R. 218). However, despite his expectation, he admitted that he was unable to buy at that figure (R. 205, 206, 233, 341). Furthermore, appellant believes that the Court should not hand down a money judgment against the Government based upon the speculation of a witness, which runs counter to other known facts. For example:

(1) Plaintiff's initial contract (for 10,000 tons) was executed September 25. The Government did not announce its modification until almost three weeks later. In that period, The Company made little, if any, effort to purchase raisins although the delivery period under the contract was October 1, 1947-December 15, 1947, and although it was the customary practice of The Company to buy heavily around October 1 (Plaintiff's Exhibit 10; Defendant's Exhibit N, pp. 15-17; R. 202-342).

(2) The market price of raisins as reported in the

⁴⁷ The Court has found (R. 75, Finding 23) that The Company's bid reflected a grower price of \$110. This is misleading. The Court would have been more accurate had it stated that The Company's bid made it essential for The Company to buy at \$110 to break even. But the active market price at that time was at least \$125 (App. C, Defendant's Exhibit N, p. 15, R. 502).

Market News, (Defendant's Exhibits K, S) was as follows:

(week ending)		Thompson ⁴⁸	Muscat	Sultana	Zante
October	8.....	\$115	\$110	\$100-105	\$140
	15.....	115	110	100	140
	22.....
	29.....	130	120	110	140-150
November	5.....	130	120-125	110	150
	6 (only).....	140	130	120	140-150
	12.....	135	135	120	150
	19.....	130	125	110-115	150
	26.....	130	125	110-115	150
December	3.....	130	130	110-115	150
	10.....	135	120-125	110-115	150
	17.....	130	110-120	100-110	...
	24.....	130
January	7.....	120-125	110	100	...
	14.....	115	100-115	90-100	...
	21.....	110	100	90	...
	28.....	100-105	100	85-90	...
February	4.....	110-115	100-105	85-90	...

(3) To break even, The Company had to buy raisins at an average price of \$110 per ton. The market price never reached \$110, except for a very few sales in early and mid-October, *and even at prices ranging up to \$125 there were practically no sales* (App. B, Defendant's Exhibit K; R. 233). The Company's total firm purchases in the period September 1-November 3 were less than 800 tons at prices ranging from \$111.22 to \$142.02 (App. B, Plaintiff's Exhibit 46). This indicated grower resistance to packer offerings. Indeed, on October 9, The Company issued an order to its buyer to purchase 1,000 tons at \$110 per ton. But the buyer was only able to purchase 135 tons at an average price of \$111.22 in the following week, and 32 tons at \$114.92 in the second succeeding week (Defendant's Exhibit N, p. 15; Plaintiff's Exhibit 46).

(4) The growers were demanding 90% of parity and the packers knew it (R. 204, 354, 541, 573).

⁴⁸ This is the type raisin covered by Docket OC-95a.

(5) On October 14 and 17 the Government announced purchases of an additional 60,000 tons. The market did not respond. Prices did not commence to rise until October 30 (App. C), and this was apparently due more to the necessity of the packers to fulfill their commercial orders than because of the Government removal of the balance of surplus.⁴⁹

(6) On November 26, the Government made \$135 a mandatory price for raisins sold to the Government after that date. This only affected sales of approximately 40,000 tons and again, as the Court will observe from the table, the announcement had little noticeable impact on the market price (App. C; R. 460).⁵⁰

From these facts, how can it be concluded that the

⁴⁹ The Court found that the amended program pushed the price to \$135 per ton (R. 78, Finding 34). This finding is not supported by the record. The amended program had no appreciable effect on the market for two or three weeks. Then the seasonal demands more than likely forced the buyers into the market (Defendant's Exhibit K, Bulletin 401, 402), and higher price offers activated the market. Thus, raisins were selling at \$115 in the week ending October 8, at \$115 in the week ending October 15 (change in program announced on October 14), price trading was at a standstill in the week ending October 22, there were a few sales at \$130 in the following week, in the week ending November 5 sales were light at mostly \$130 per ton; on November 6 some packers offered \$140 per ton, and sales were heavy, but many packers quickly withdrew the \$140 price, and most sales in the week ending November 12 were at \$135. That influence of the seasonal demands, rather than Government interference, caused price rises is suggested by the fact that raisins not supported by Government purchases rose in price at the same time, and at about the same rate (R. 202; see the table above.)

⁵⁰ By November 26, The Company had had two months within which to purchase raisins, delivery of which was scheduled for the period October 1-January 20. By November 26, delivery on the first contract should have been near completion and delivery on the second contract well under way. Hence, how could CCC be responsible for acts which should have followed The Company's performance?

purchase of 60,000 tons prevented the drop in price to \$110? This theory, accepted by the District Court, gives no consideration to grower resistance. It assumes without any proof whatsoever that had the Government not acted, the emphatic and sustained resistance of the growers (R. 54, 57, 202, 204, 205, 341, 390, 574, 575) to excessively low prices would have collapsed. If the packers had had no commitments to cover, this argument might have some validity, but the packers had commercial contracts which required delivery of large quantities of raisins and they had to supply raisins in large quantities for the Christmas market. In fact, as the record shows, The Company, by December 1, 1947, had supplied 75% of its commercial commitments (Plaintiff's Exhibit 47, 48). Faced with this pressure, it seems reasonable to conclude that the packers would have had to come to terms with the growers, and that the price would not have been \$110 per ton. That price was not reached until January when the commercial demands had been materially met and the Government had suspended purchases (R. 388).

We think that to award damages to appellee, whose predecessor had sold *short—at a price below market*,⁵¹

⁵¹ The District Court's statement (R. 57) that The Company bid "on the basis of the then existing market level" is not borne out by the record. The Government's Announcement was made on September 10, 1947. The Company's offer was submitted on September 17, 1947 (Plaintiff's Exhibit 10). The "then existing market level," (if, indeed, there was any) is reported in the Market News Service (Defendant's Exhibit K, Bulletin 396) covering the week ending September 17, as follows:

With most packers not yet offering to buy, quotations to growers September 17 for natural Thompson Seedless were mostly \$125.00 per ton delivered at packers receiving station with an occasional offer slightly lower and a little buying at \$130.00 delivered, for delivery by September 20.

The Company bid on the basis of \$110 per ton, or \$15 per ton below quoted prices. The second offer was submitted by The Company

and to base its damage on the anticipated collapse of the market is to simply ignore the evidence, which establishes that The Company was deliberately taking a gamble as to future market conditions, including further Government price support.

Certainly there is no proof from which a rational conclusion can be drawn that without the change in program the growers would have sold for \$110 per ton or less; and if this is to be the basis of damage, the ordinary rules relating to the burden of proof will have to be sidestepped. As aware as we are of our duty to assist the Court to determine the amount of damage, we are not able to even guess the price which might have prevailed had there been no further Government price support. Appellant submits that appellee has not sustained the burden of proving its damage.

on October 8 (Plaintiff's Exhibit 15), also in the assumption that raisins would be purchased for \$110 per ton. The Market News Service (Bulletin 399) covering the week ending October 8, 1947 reflects the price of Thompson Seedless as follows: "Mostly \$115, few \$110." The report also notes "Considerable grower resistance to current bid was reported * * *." (See Defendants Exhibit L).

The District Court also found that because of CCC's modifications the price of raisins was boosted to "artificially and abnormally high levels" (R. 79), and in its opinion the Court states that the growers were demanding "exorbitant prices." (R. 54). These conclusions are not supportable. The growers wanted parity, which would have meant \$150-\$160 per ton (R. 204, 541, 573), but they were accepting \$130-\$135 per ton during the peak of the buying season, prices well below the 90% of parity other farmers were enjoying (Defendant's Exhibits K, S). A quick glance at Plaintiff's Exhibit 46 will disclose the facts with respect to the "exorbitant" prices being paid by The Company. Only in one week of the season did The Company pay more than \$140 per ton. Of course, the prices demanded by the growers were more than The Company could afford to pay insofar as their Government contracts were concerned; but these contracts were bid at prices below market, and at approximately one-third of the 1946 price level. These "exorbitant prices" being demanded by the growers were the lowest they had received since 1942 (Plaintiff's Exhibit 44, p. 56).

CONCLUSION

This case does not involve merely the right of a contractor to recover damages from the Government. The fundamental issue is whether a Government agency, engaged in the performance of a Governmental function, has the right to modify its program without responding in damages. In this respect appellant submits that agencies engaged in fixing tariffs, in supporting farm prices, in formulating price controls and in other Governmental functions should be completely free to make and revise their programs as the necessities of the nation require, and that this freedom to act for the public welfare should not be fettered by fear or threat of incurring liability for damages.

Appellant further submits that even had the acts complained of been proprietary in character, there is no basis for recovery since the elements of contract, whether express or implied, are not present. There was no promise by CCC to rigid adherence to the program as first announced, and therefore no basis, in fact, for inferring a promise to compensate The Company for damages sustained by the change in program.

WHEREFORE, appellant respectfully submits that the judgment of the District Court should be reversed, and judgment entered for appellant, with costs.

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APPENDIX A

List of Exhibits Offered
Plaintiff's Exhibits

1. Bill of sale, Roberg to Rosenberg Bros.
2. Letter from Senator Downey to Grady dated September 30, 1948.
3. Marketing Outlook—1947 Crop Raisins.
4. Press release of September 5, 1947.
5. Docket 1947 Dried Fruit Price Support Program.
6. Telegram from Grady to Smith dated September 9, 1947.
7. Letter from Grady to Smith dated September 10, 1947.
8. Telegram from Smith to Grady dated September 12, 1947.
9. Announcement No. 1 of September 10, 1947.
10. Contract A6pm(Ff)—1647 dated September 24, 1947.
11. Telegram from Walker to Rosenberg Bros. dated September 23, 1947.
12. Telegram from Rosenberg Bros. to Walker dated September 24, 1947.
13. Press release of September 25, 1947.
14. Announcement No. 2 of October 1, 1947.
15. Contract A6pm (Ff)-1893 dated October 13, 1947.
16. Telegram from Walker to Rosenberg Bros. dated October 13, 1947.
17. Telegram from Rosenberg Bros. to Anderson dated October 14, 1947.
18. Telegram from Rosenberg Bros. to Anderson dated October 15, 1947.
19. Press release of October 14, 1947.
20. Letter from Rosenberg Bros. to Department of Agriculture dated October 21, 1947.

21. Telegram from Grady to Anderson dated October 31, 1947.

22. Letter from Grady to Downey dated November 3, 1947.

23. Telegram from Anderson to Grady dated November 6, 1947.

24. Press release of November 26, 1947.

25. Press release of October 17, 1947.

26. Telegram from Davidson to Grady dated December 2, 1947.

27. Grady's memorandum re telephone conversation with Anderson on December 4, 1947.

28. Telegram from Grady to Davidson dated December 4, 1947.

29. Telegram from Davidson to Grady dated January 21, 1948.

30. Letter from Laffin to Walker dated January 22, 1948.

31. Letter from Grady to Downey dated January 23, 1948.

32. Telegram from Allmendinger to Rosenberg Bros. dated January 26, 1948.

33. Telegram from Grady to Allmendinger dated January 28, 1948.

34. Telegram from Grady to Allmendinger dated January 28, 1948.

35. Telegram from Grady to Allmendinger dated January 28, 1948.

36. Telegram from Grady to Allmendinger dated January 29, 1948.

37. Telegram from Downey to Grady dated January 30, 1948.

38. Claim of Rosenberg Bros. dated February 26, 1948.

39. Letter from Grady to Anderson dated September 21, 1948.
40. Letter from Anderson to Grady dated February 2, 1949.
41. Letter from Grady to Anderson dated February 3, 1949.
42. Record of shipments, Contract No. A6pm(Ff)-1647.
43. Record of shipments, Contract No. A6pm(Ff)-1893.
44. Market News issued in July 1948.
45. Schedule showing cost of raisins acquired to cover CCC contracts.
46. Schedule showing record of 1947 crop raisins acquired by Rosenberg Bros.
47. Schedule showing civilian sales by Rosenberg Bros.
48. Schedule showing purchases and sales by Rosenberg Bros.
49. Minutes of the Board of CCC dated October 27, 1947.
50. Report of Smith dated October 23, 1947.
51. Tabulation of bids on first invitation.
52. Grower contract forms.
53. Tabulation of Rosenberg export sales.
54. Tabulation of accepted bids.
- 55.. Plaintiff's LIFO computations.
56. Plaintiff's LIFO computations.
57. Plaintiff's computation of damage.
58. Plaintiff's computation of damage.

DEFENDANT'S EXHIBITS

- A. Letter from Stern to Grady dated January 26, 1951.

B. Memorandum from Grady to Oppenheimer dated September 30, 1947.

C. Rosenberg "tags".

D. Letter from Grady to Cummings dated September 4, 1948.

E. Press release of August 4, 1947.

F. Memorandum re telephone conversation between Anderson and Grady on December 4, 1947.

G. Stenographer's notes.

H. Letter from Anderson to Weinfeld dated September 8, 1949.

I. Letter from Smith to Grady dated October 13, 1949.

J. Bulletin of Dried Fruit Association dated October 8, 1947.

K. Federal State Market News Service bulletins from September 11, 1947 to October 30, 1947.

L. Telegram from Walker to Graham dated October 9, 1947.

M. Minutes of Board meeting of CCC on October 8, 1947.

N. Deposition of Edmund A. Foley.

O. Memorandum from Oppenheimer to Ashby dated May 28, 1948.

P. Fresno Bee newspaper article dated October 10, 1947. (Id.)

Q. Fresno Bee newspaper article dated October 12, 1947. (Id.)

R. Announcement No. 10 dated December 5, 1947.

S. Federal State Market News Service bulletins from November 6, 1947 to June 3, 1948.

T. Federal State Market News Service bulletins from August 7, 1946 to September 4, 1946. (Id.)

U. Transcript of notes of Allmendinger re Grady conversation.

V. Notice to Deliver.

W. Letters in lieu of notice to deliver.

Y. Payment voucher form.

Z. Announcement FV-B-6 dated November 7, 1947.

AA. Contract A6pm(Ff)-1940 dated November 26, 1947.

AB. Schedule of shipments under contract A6pm (Ff)-1940.

AC. Tabulation of purchases and sales by Rosenberg Bros.

AD. Statement of profit and loss re Rosenberg Bros. (Id.)

AE. Purchase and sales agreement.

AF. Letter from Wright to Heller, et al., dated December 23, 1947. (Id.)

AG. Tabulation of purchases and sales of Rosenberg Bros. (Id.)

AH. Letter from Grady to Cooper dated October 8, 1947.

AI. Record of purchases and sales of Rosenberg Bros. (Id.)

AJ. Charter of Commodity Credit Corporation.

AK. By-Laws of Commodity Credit Corporation.

AL. Contract Disputes Board hearing. (Id.)

AM. Contract Disputes Board minutes. (Id.)

AN. Letter from Sullivan to Ehrlich dated August 31, 1950. (Id.)

AO. Schedule re plaintiff damages.

APPENDIX B

RB&CO'S PURCHASES ON CLOSED CONTRACTS
(Plaintiff's Exhibit 46)

Period Ending	Amount (Tons)	Period Ending	Amount (Tons)
6/27/47	1,785	2/16/48	54
7/15/47	466	2/24/48	888
7/26/47	956	3/ 1/48	678
9/ 6/47	10	3/ 8/48	353
9/22/47	1—	3/15/48	2
10/ 2/47	10	3/22/48	387
10/ 6/47	1—	3/30/48	267
10/14/47	135	4/ 5/48	76
10/20/47	32	4/13/48	1,996
10/27/47	3	4/20/48	20
11/ 3/47	508	4/27/48	128
11/10/47	4,785	5/ 3/48	552
11/17/47	4,932	5/10/48	1,070
11/24/47	1,111	5/17/48	87
12/ 1/47	4,035	5/31/48	1,048
12/ 8/47	842		
12/15/47	1,870		
12/22/47	2,046		
12/30/47	615		
1/ 5/48	340		
1/12/48	1,090		
1/19/48	438		
1/26/48	845		
2/ 2/48	191		
2/ 9/48	639		

APPENDIX C

MARKET PRICE OF NATURAL RAISINS
(Defendant's Exhibits K, S)

Period Ending	Price	Period Ending	Price
9/11/47	\$125-140	2/25/48	\$110-120
9/17/47	\$125-130	3/ 3/48	\$110-125
9/24/47	(not stated)	3/10/48	\$110-125
10/ 1/47	\$115-120 (mostly \$120)	3/17/48	\$110-120
10/ 8/47	\$110-115 (mostly \$115)	3/24/48	\$110-115
10/15/47	\$110-115 (mostly \$115)	3/31/48	\$110-115
10/22/47	(not stated—"Price trading at a standstill")	4/ 7/48	\$110-117.50
10/29/47	\$130-135 (mostly \$130)	4/14/48	\$110-115
11/ 5/47	\$130-135	4/21/48	\$110-115
11/ 6/47	\$140	4/28/48	\$110-115
11/12/47	\$135-140 (mostly \$135)	5/ 5/48	\$110-115
11/19/47	\$125-130 (mostly \$130)	5/12/48	\$115-120
11/26/47	\$125-135 (mostly \$130)	5/19/48	\$115-120
12/ 3/47	\$130-135 (mostly \$130)	5/26/48	\$115-120
12/10/47	\$130-135 (mostly \$135)	6/ 2/48	\$120-135
12/17/47	\$130-135 (mostly \$130)		
12/24/47	\$130		
1/ 7/48	\$120-125		
1/14/48	\$110-115 (mostly \$115)		
1/21/48	\$105-110 (mostly \$110)		
1/28/48	\$100-110 (mostly \$100-105)		
2/ 4/48	\$110-115		
2/11/48	\$110-115		
2/18/48	\$110-115		

APPENDIX D

When the Commodity Credit Corporation entered into the contracts in question, it was operating under its Delaware charter as an agency and instrumentality of the United States.

The Commodity Credit Corporation was created on October 17, 1933, under the laws of the State of Delaware as an agency of the United States pursuant to Executive Order 6340, dated October 16, 1933, issued by virtue of the authority vested in the President by section 2(a) of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195).¹ Section 2(c) of that Act provided that any agencies established under Title I of the Act should cease to exist at the expiration of two years after the date of enactment of the Act. Congress expressly recognized the Corporation as being an agency of the United States, and by the Act of January 31, 1935, directed that the Corporation should "continue until April 1, 1937, or such earlier date as may be fixed by the President by Executive order, to be an agency of the United States." The Corporation was continued as an agency of the United States until June 30, 1948, by successive amendments to the Act of January 31, 1935 (15 U. S. C. 713).² By section 401 of the

¹ Under this subsection, the President was authorized "to establish such agencies" as necessary to effect the policy of Title I of the Act, *viz.*, to remove obstructions to the free flow of interstate and foreign commerce; to provide for the general welfare by promoting full utilization of the productive capacity of industries; and to increase the consumption of agricultural products by increasing the purchasing power, etc.

² Act of January 26, 1937, 50 Stat. 5; Act of March 4, 1939, 53 Stat. 510; Act of July 1, 1941, 55 Stat. 498; Act of July 16, 1943, 57 Stat. 566; Act of December 23, 1943, 57 Stat. 643; Act of February 28, 1944, 58 Stat. 105; Act of April 12, 1945, 59 Stat. 551; and Act of June 30, 1947, 61 Stat. 201.

President's Reorganization Plan No. 1 (t U. S. C. 133t, note), effective July 1, 1939, the Corporation was made a part of the United States Department of Agriculture, and its operations were placed under the supervision and control of the Secretary of Agriculture. By Executive Order No. 9322 (8 F. R. 3807), dated March 26, 1943, as amended by Executive Order No. 9334 (8 F. R. 5423), dated April 19, 1943, the Commodity Credit Corporation and certain other activities of the Department of Agriculture were consolidated within that Department into a War Food Administration under the direction and supervision of an Administrator, appointed by and directly responsible to the President. However, by Executive Order No. 9577 (10 F. R. 8087), dated June 29, 1945, the War Food Administration terminated at the close of business on June 30, 1945, and the functions and duties of the War Food Administrator were transferred to the Secretary of Agriculture.

The Commodity Credit Corporation was originally capitalized at \$3,000,000, its stock being subscribed by the Secretary of Agriculture and the Governor of the Farm Credit Administration. The funds for such subscription were derived from the appropriation authorized by section 220 of the National Industrial Recovery Act (48 Stat. 210) and made available by the Fourth Deficiency Act for the Fiscal Year 1933 (48 Stat. 274). As authorized by the Act of April 10, 1936, the Corporation's capitalization was increased to \$100,000,000 and the additional \$97,000,000 of the Corporation's stock was acquired by the Reconstruction Finance Corporation.³

³ Act of April 10, 1936, 49 Stat. 1191, 15 U.S.C. 713a.

By Section 3 of the Act of March 8, 1938, the Secretary of Agriculture, the Governor of the Farm Credit Administration, and the Reconstruction Finance Corporation were directed to transfer the ownership of the stock of the Corporation to the United States.⁴ That Act also provided that all rights of the United States arising out of the ownership of such stock should be exercised by the President of the United States or by such officers or agencies as he may designate. Executive Order No. 8219, issued August 7, 1938, transferred to the Secretary of Agriculture the authority to exercise, on behalf of the United States, all rights arising out of the ownership of the stock of the Commodity Credit Corporation.⁵

The Congress, by section 4 of the Act of March 8, 1938, authorized the Corporation, with the approval of the Secretary of the Treasury, to issue and have outstanding bonds, notes, debentures, and similar obligations in an aggregate amount not to exceed \$500,000,000 fully guaranteed as to principal and interest by the United States Government.⁶ By successive amendments to the Act of March 8, 1938, the borrowing power of the Corporation was increased, the last amendment being the Act of April 12, 1945, which increased the Corporation's borrowing power to \$4,750,000,000.⁷

The Act of March 8, 1938 (52 Stat. 107), as amended by the Act of April 12, 1945 (59 Stat. 50), required the Secretary of the Treasury to make an appraisal of the net worth of the Corporation as of June 30 in each

⁴ Act of March 8, 1938, 52 Stat. 107, 15 U.S.C. 713a-3.

⁵ 4 F.R. 3565.

⁶ Act of March 8, 1938, 52 Stat. 108, 15 U.S.C. 713a-4.

⁷ Act of April 12, 1945, 59 Stat. 50, 15 U.S.C. 713a-4.

year, provided for the restoration of any capital impairment disclosed in the appraisal from appropriations authorized for such purpose, and directed the Corporation to pay into the United States Treasury any net worth in excess of \$100,000,000.

The Delaware Charter of the Commodity Credit Corporation authorized the Corporation, among other things, to engage in buying, selling, lending, and other activities with respect to agricultural commodities, products thereof, and related facilities.⁸

These charter powers enabled the Corporation to engage in extensive operations for the purpose of increasing production, stabilizing prices, assuring adequate supplies, and facilitating the efficient distribution of agriculture commodities, foods, feeds, and fibers.

Section 304(b) of the Government Corporation Control Act (59 Stat. 597, 31 U.S.C. 847-849) required that all wholly-owned government corporations incorporated under State law be reincorporated by act of Congress in order to continue as agencies or instrumentalities of the United States.⁹ By the Commodity Credit Corporation Charter Act of June 29, 1948, the Congress created a federal corporation and all assets, funds, and property, together with enforceable claims of the Delaware corporation, were transferred to the Federal corporation.¹⁰ Section 6 of said Act provided that the "Commodity Credit Corporation, a Delaware corpora-

⁸ Delaware Charter is set forth at p. A307, Sen. Doc. No. 86, 79th Cong., 1st Sess.

⁹ Act of December 6, 1945, 59 Stat. 602, 31 U.S.C. 869.

¹⁰ Act of June 29, 1948, 62 Stat. 1070, 15 U.S.C. 714.

tion shall cease to be an agency of the United States.” Section 2 of the Act provided that the Federal corporation “shall be an agency and instrumentality of the United States.”¹¹

¹¹ The treatment of the Federal Surplus Commodities Corporation by the Congress and the courts as an agency of the United States is analogous to that afforded the Commodity Credit Corporation. The Federal Surplus Commodities Corporation was chartered by officials of the Federal Government under the laws of the State of Delaware in the absence of an Executive order but pursuant to authority conferred in section 2(a) of the National Industrial Recovery Act (48 Stat. 195). It was recognized by Congress as an agency of the United States (Act of June 28, 1937, 50 Stat. 323, 15 U.S.C. 713c) and the courts have recognized its contracts and actions as being those of the United States: *John Morrell & Co. v. United States*, 89 Ct. Cls. 167; *United States v. Samuel Dunkel & Co.* 184 F. 2d 894 (C.A. 2, 1950); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, and *Traders Compress Co. v. United States* (Ct. Cls.), 74 F. Supp. 649.

No. 14,884

In the

United States Court of Appeals

For the Ninth Circuit

COMMODITY CREDIT CORPORATION,

vs.

Appellant,

ROSENBERG BROS. & CO. INC.,

a Corporation,

and

Appellee,

ROSENBERG BROS. & CO. INC.,

a Corporation,

vs.

Appellant,

COMMODITY CREDIT CORPORATION,

Appellee.

Reply Brief for Rosenberg Bros. & Co. Inc.

Appeals from the United States District Court for the
Northern District of California—Southern Division.

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FILED

MAY 18 1956

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In the
United States Court of Appeals
For the Ninth Circuit

COMMODITY CREDIT CORPORATION,
vs. *Appellant,*

ROSENBERG BROS. & CO. INC.,
a Corporation,
and *Appellee,*

ROSENBERG BROS. & CO. INC.,
a Corporation,
vs. *Appellant,*

COMMODITY CREDIT CORPORATION,
Appellee.

Reply Brief for Rosenberg Bros. & Co. Inc.

Appeals from the United States District Court for the
Northern District of California—Southern Division.

STATEMENT OF THE CASE

Appellant's statement of fact is neither complete nor accurate and requires a further exposition of the events which gave rise to this suit.

This case arose out of the sale in 1947 of 14,330 tons of processed raisins by Rosenberg Bros. & Co.* (hereinafter referred to as Rosenberg), a California dried fruit processor, to Commodity Credit Corporation† (hereinafter referred to as CCC) and the subsequent conduct of CCC and its officials which increased Rosenberg's cost of acquiring raisins to cover its sales to CCC. The complaint contains two causes of action, one based on the violation by CCC of its express contractual commitments (not to purchase in excess of 61,000 tons of 1947 crop Thompson seedless raisins, to purchase only from packers and processors and not from producers, and not to provide price support at any given level), and the other based on violation of CCC's implied contract not to hinder Rosenberg's performance or render it more difficult or expensive. The District Court gave judgment for plaintiff on the basis of CCC's breach of its implied agreement.

In 1947 when plaintiff's causes of action arose, CCC was a Delaware corporation, all the stock of which stood in the name of the United States (Def. Ex. AJ; Title 15 U.S.C. 713, 713a-3). In making the raisin purchases in question, CCC acted as an instrumentality of the Department of Agriculture, and utilized the personnel of the Production and Marketing Administration (hereinafter referred to as PMA). PMA and CCC were closely connected and many PMA officials also served as functionaries of CCC. Clinton Anderson, for example, was not only Secretary of Agriculture, but also held the position of Chairman of the Board of CCC (11 Fed. Reg. 177A-242 § 200.4), exercised all rights of stock ownership in CCC on behalf of the United States (11 Fed. Reg. 177A-242 § 200.3) and supervised and controlled all operations of CCC (Def. Ex. AK § 15(a); 11 Fed. Reg. 177A-242 § 200.1; Reor-

*Plaintiff is a Maryland corporation which succeeded to Rosenberg's claim against CCC.

†Defendant is a federal corporation which succeeded to all the assets and assumed all the liabilities of CCC, a Delaware corporation.

ganization Plan No. 3, Part V § 501). The Administrator of PMA was also President and a director of CCC (11 Fed. Reg. 177A-242 §§ 200.4, 200.5). The directors and vice presidents of CCC also served as top officials of PMA (11 Fed. Reg. 177A-242 §§ 200.4, 200.5; Def. Ex. AK §§ 12(a), 20). Plans for dried fruit purchase programs were formulated and administered through the Fruit and Vegetable Branch of PMA, but all such plans were subject to the approval of CCC and the Secretary of Agriculture, and were formally adopted by the Board of Directors of CCC. Purchases were actually made by officials of the Fruit and Vegetable Branch of PMA, but they acted in their capacity as contracting officers of CCC (11 Fed. Reg. 177A-242 § 200.8; Def. Ex. AK § 28(a); Title 7 C.F.R. (1946 Supp.) Ch. XXI, Subch. C § 2301.1(d)(4), 2301.10, 2305.14).

On or about July 25, 1947, representatives of the raisin industry in California, through an industry committee, in which Rosenberg employees and officials of the Department of Agriculture participated, estimated that the surplus of 1947 crop Thompson seedless raisins would be 100,000 tons (Pl. Ex. 3; R. 155 et seq.*). This was a conservative (i.e. low) figure based on "a hopeful expectation" of domestic and export sales (R. 157). Copies of this report were sent to interested parties, including the Fruit and Vegetable Branch of PMA in Washington, D. C., and its local office in Berkeley, California (R. 157). S. R. Smith, head of the Fruit and Vegetable Branch, testified that he was aware of this estimate in August, 1947 (R. 530), and Secretary Anderson admitted his knowledge of this estimate in September; but from the content of his remarks, he must have meant early August, 1947 (R. 353-354). The Department of Agriculture itself, as early as July, 1947, estimated the 1947 industry surplus of Thompson seedless raisins as 100,000 tons or more (R. 482).

*References to the printed record will be designated in this manner.

In early August, 1947, both S. R. Smith and Secretary Anderson met with packer and grower groups in California and discussed CCC's projected 1947 raisin purchases. Smith had previously been informed by the Board of CCC, to guide his discussions in these meetings, that CCC did not plan to underwrite any dried fruit crop at a specified price level, but that it did anticipate purchasing dried fruit for foreign relief needs, schools and institutions, and hoped to use its funds to encourage exports (R. 488). Smith told both growers and packers that the Department was willing to consider acquisition of raisins for distribution to schools and institutions, for foreign relief feeding and for human consumption in occupied areas, as well as the use of its funds for a commercial export program, but that it would not undertake a price support program underwriting prices at any given level (R. 490-493).

At a press conference immediately after a luncheon held in Fresno on August 4, 1947, Secretary Anderson stated his determination not to support prices for dried fruits as he had in the case of potatoes. He did not want to be accused of wasting products, and would take no more dried fruit than could be used in three ways: "(1) by the school lunch program; (2) by the program of regular shipments to our Armed Forces and those countries over which the American flag was flying abroad; and (3) by subsidizing export into the Northern countries where dried fruits are a very important part of their diet and a very valuable part of their diet" (R. 354-355). In a speech broadcast over the radio the same day, Secretary Anderson reiterated these views, adding that he would not duplicate the potato program in the dried fruit industry by underwriting prices at any fixed level, and warning the industry that the contemplated program offered a decidedly limited outlet for dried fruit (R. 356-357; Def. Ex. E). At other discussions with farm groups, Anderson even suggested destruction of surplus raisins, and told them that the Department would take surplus raisins only at prices at which they would move into coun-

tries where foreign exchange was a problem, and at prices at which CCC could resell raisins to the Army, which was at the time "somewhat of a tough trader" (R. 360). These preliminary discussions of Smith and Anderson with industry groups in California could not fail to create the strong impression that CCC would acquire only so many 1947 crop raisins as it could dispose of for certain specific purposes; that CCC would acquire these raisins only at prices low enough so they could be resold to "tough traders"; and that CCC would not support prices at any given level.

The program originally adopted by CCC confirmed these early impressions. S. R. Smith, in August, 1947, submitted a dried fruit program, prepared in his branch, to the Board of Directors of CCC. This program was known as Docket OC-95a and covered the entire 1947-1948 crop year (R. 161, 539-540; Pl. Ex. 5).^{*} The rules of the Department of Agriculture required secrecy with regard to the contents of Docket OC-95a, and, to Smith's knowledge, neither Rosenberg nor any other packer had access to the docket (R. 163-166). The economic factors on which Smith's proposals were based were contained in a statement of supporting data in the docket. This statement confirmed the industry's estimate of a surplus of 100,000 tons of Thompson seedless raisins.[†]

Smith's docket provided for purchase of a maximum of 133,000 tons of dried fruits, and Smith recommended that this total include no more than 61,000 tons of raisins (R. 504, 538). The docket stated that the purchase program recommended would enable the *dried fruit industry* to establish prices commensurate with the remaining supply and corresponding market demand. All dried

^{*}While Smith's original recommendation to the Board of CCC also contained an export subsidy program, the Board failed to adopt that part of the proposal and the trial court struck Smith's testimony regarding it (R. 505-506). The docket which the Board adopted is Plaintiff's Ex. 5 (R. 163).

[†]The docket showed an estimated surplus of 98,000 tons *processed weight*. On the basis of the accepted 6% shrinkage factor (to allow for stemmer waste in processing), this represents approximately 104,000 tons of natural condition raisins.

fruits acquired under this program were to be received by or for the account of CCC, and were to be disposed of by sale or other means in certain stated channels. The program was designed to operate through dried fruit *packers* rather than by direct CCC purchase from growers because of the packers' greater experience in field buying. The purchase program was based on *competitive bidding* by packers rather than on negotiated prices or prices fixed at arbitrary levels. The stated purpose of this method of purchase was to enable CCC to reap the advantage of the accumulated marketing experience of the entire group of growers and packers in establishing price levels necessary to move available supplies into prompt consumption.

Docket OC-95a carried an endorsement by the Acting Solicitor of the United States Department of Agriculture to the effect that all purchases by CCC would be made on an "offer and acceptance basis."* The Acting Solicitor then stated:

"We understand that 'offer and acceptance basis' as used in the docket refers to a method of sale which involves (1) the issuance of an announcement that Commodity Credit Corporation desires to purchase certain commodities or that Commodity Credit Corporation makes commodities available for sale, such announcement either to specify prices or to call for bids from the public which will specify prices, (2) offers from the public made *on the basis of such an announcement*, and (3) acceptance by Commodity Credit Corporation of those offers which are *most favorable to the Government*. Sales on a 'negotiated basis' are negotiated with particular buyers without an announcement having been made to the public." (Emphasis added.)

*The provisions for competitive bidding and for disposition of raisins acquired by CCC in limited outlets, as well as the Acting Solicitors statement, reflect Secretary Anderson's preliminary comments that CCC would buy only so many raisins as it could dispose of in certain designated channels at prices which would enable it to resell at unfavorable exchange rates in foreign countries and to the Armed Services which were at the time "somewhat of a tough trader."

After approval of Docket OC-95a by the Board of Directors of CCC, Secretary Anderson, the Chairman of the Board of CCC, on September 5, 1947, made an announcement to interested packers and growers and to the public of the general outline of the dried fruit purchase program embodied in Docket OC-95a (R. 167-169). This announcement took the form of a written release to the press (Pl. Ex. 4) in Albuquerque, New Mexico, and was later distributed by mail to interested persons in the industry, including Rosenberg (R. 158). This announcement was not a mere "off-the-cuff" remark to the press. It was a carefully worded and well-drafted document and was the only announcement to the industry of the *general outline* of CCC's 1947 purchase program (Finding 12). The circumstances surrounding its issuance emphasize that its purpose was to enable the industry to "make its plans" and that it was intended that the industry should rely on its terms. The docket itself (Pl. Ex. 5) stressed the importance of early positive action and immediate announcement of CCC's 1947 purchase program to the industry "to avoid serious and unnecessary price decline." The September 5 announcement originated in the Fruit and Vegetable Branch of PMA, and S. R. Smith, head of the branch, forwarded it to his superiors for their approval (R. 550-551). The draft of this announcement eventually reached New Mexico in the hands of Jesse Gilmer, President of CCC. Secretary Anderson testified that he met at Albuquerque, on September 5, 1947, with Nathan Koenig, his administrative assistant, Jesse Gilmer, Mr. Trigg, an Administrator of PMA, and others; that they then acquainted him with Docket OC-95a, and also presented him with the prepared text of an announcement of the program embodied in the docket (Pl. Ex. 4; R. 361-362; 425). After editing (R. 425), the announcement was given to the newspapers in typewritten form (R. 395).

The announcement confirmed the preliminary statements of Smith and Anderson as to the nature of CCC's 1947 dried fruit

activities. It stated that "Commodity Credit Corporation will purchase *up to* 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production." (Emphasis added) It continued in the following words:

"The *maximum limit* of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 *tons of raisins*, and 66,000 tons of dried prunes.

"Purchases of dried fruits under the program will be made from *processors and packers* of dried fruits. An announcement will be issued soon inviting *packers* to submit offers on a portion of the quantity to be purchased.

* * * * *

"The purchase program *does not provide price support at any given level*, but is expected to result in reasonable prices to producers and consumers. * * *" (Emphasis added.)

At the time of the announcement, packers were in a short position because at that time it was so early in the season that 1947 crop raisins were not yet made (R. 103-105). Growers are always reluctant to sell before their raisins are boxed and they know what their crop is (R. 202, 342), and packers always try to buy well-cured raisins so that they will not have to redry them (R. 105). S. R. Smith recognized that the bids made under the September 5 announcement came at a time when packers would not normally have sufficient raisins to cover the bids (R. 563-564). This situation was particularly acute in 1947 because of grower resistance to selling created by the confused market situation (R. 183, 203-204).*

*Growers, under the leadership of Setrakian (head of the Raisin Producers Association) were holding raisins for parity or 90% of parity, i.e., \$150-\$160 per ton (R. 573-575).

The obvious effect of the program announced on September 5, a program designed to remove by competitive bidding only 61,000 tons of an indicated surplus of 100,000 tons or more, was to depress prices. Dwight Grady (an expert on the California dried fruit situation, who in 1947-1948 was a Vice President of Rosenberg, but who is no longer in Rosenberg's employ) testified that its depressing effect was even more marked because the bidding proceeded in two stages, and those bidders who had been unsuccessful in the first stage were expected to and did bid lower on CCC's second call (R. 173-176).*

Grady, acting on behalf of Rosenberg, with the concurrence of several other packers, conveyed his views about the shortcomings of the announced program to CCC and Department of Agriculture officials. When Grady first learned of the raisin program, on Saturday, September 6, 1947, he immediately called Erwin Graham, head of the Special Crops Division of the Fruit and Vegetable Branch, and pointed out the insufficiency of the program announced, as well as its price depressing effects (R. 173-175). Before Rosenberg made its first bid under the program, Grady spoke with other officials of the Department of Agriculture, and again indicated the inadequacy of the program, suggesting purchases at a fixed price to counteract the price depressing effect of the announcement (R. 177). Admittedly, Rosenberg's activity was not entirely altruistic. It was to its interest as well as to the interest of growers to have a workable program based on reasonable prices to growers. Grady stated that packers do not fare nearly so well in times of grower distress as they do in times of grower prosperity, and that Rosenberg's aim was to bring about stability in the raisin industry (R. 184, 208-209).

*The trial court resolved any conflict of testimony on the effect of CCC's 1947 raisin purchase program, as announced September 5, 1947, by confirming Grady's expert opinion as to its effect (Finding 16).

On September 9, 1947, Grady, with the concurrence of other leaders in the industry, sent a telegram to Smith, suggesting the use of a Webb-Pomerene technique—purchase of raisins for export at fixed prices—to alleviate the bad situation created by the program announced (Pl. Ex. 6). The telegram was followed on the next day by a letter (Pl. Ex. 7) explaining Grady's suggestion. Both the telegram and the letter informed Smith that packer offerings of raisins to CCC under its announced program would be substantially short sales, because commercial handlers had been unable to contract new tonnage, which approximated two-thirds of the total crop.* Smith admitted that he had no reason to question Grady's statements about the packers' short position (R. 559), and that even apart from any specific notice, the general situation indicated that packer offerings under CCC's first call for bids on raisins were in excess of their purchases (R. 577). Therefore, if and when CCC accepted these bids, packer sales would necessarily have been "short sales".

Smith's answer to Grady's letter and telegram was sent by telegraph on September 12, 1947 (Pl. Ex. 8). The Secretary had already stated in his Fresno speech in August and in the announcement issued September 5, 1947, in Albuquerque that dried fruit prices would not be supported at a fixed level. Smith, in answering Grady, declared that Grady's suggestions were contrary to the Secretary's statements, and continued:

"The program as announced is substantial contribution toward stabilized conditions within Dried Fruit Industry. We solicit and expect receive cooperation Rosenberg and other packers in making it a success."

*Grady testified that the remaining one-third of the crop was produced by grower-members of Sun Maid, the raisin growers' cooperative which had no problem of acquiring raisins (R. 182), and that his reference to two-thirds of the crop in the telegram meant that portion of the crop handled by independent processors (R. 186-187).

The purport of these words is clear: The announcement is *the* program, and the program will not be changed in any manner contrary to the announcement. Grady regarded Smith's telegram as a final decision of the Department against any change in the program as announced and as a declaration that offers would be received on the conditions contained in the announcement (R. 194). Rosenberg then determined to bid on a realistic basis to get the business (R. 194-195).

CCC's first call for bids on raisins pursuant to the announced program was dated September 10, 1947 (Pl. Ex. 9), and invited offers for sale to CCC of up to 30,000 tons of raisins. On September 17, 1947, Rosenberg offered to sell CCC 6,000 tons at a price of \$151 per ton and 4,000 tons at a price of \$152 per ton. This offer was made on a mimeographed bid form supplied by CCC (Pl. Ex. 10), and was accepted on or about September 23, 1947 (Pl. Ex. 11, 12). At the time of this call CCC purchased 30,000 tons from Rosenberg and other packers. Rosenberg's bid was low, and Sun Maid, the raisin growers' cooperative, was second low at a price only slightly in excess of that offered by Rosenberg (Pl. Ex. 54). The interrelationship of this purchase and the program announced September 5, 1947, are accentuated by the Department's own announcement of the purchase (Pl. Ex. 13), which characterizes it as a purchase "under the program announced by the Department September 5, 1947."

CCC's second call for bids (Pl. Ex. 14) invited offers on the remaining 31,000 tons of raisins comprising the 61,000 tons referred to in the September 5 announcement. Rosenberg submitted an offer for 10,000 tons on CCC's mimeographed bid form (Pl. Ex. 15), but only 4,330 tons of its offer were accepted. The acceptance was by night letter dated October 13, 1947, which was received by Rosenberg on the morning of October 14 (Pl. Ex. 16; R. 215-216).

Rosenberg was the *high* bidder (\$149.40 per ton) among those packers whose offers were accepted on CCC's second call. Sun

Maid, the grower cooperative, bid \$145.48 per ton. All bids accepted were lower than the lowest bid made under Announcement No. 1 (Pl. Ex. 54).

At the time when CCC accepted Rosenberg's two bids, its officials knew that all independent packer sales to CCC under Announcements No. 1 and No. 2 were short sales, which independent packers would have to cover by field purchases at a later date (Finding 21).

In its brief, Appellant repeatedly makes the unfounded charge that Rosenberg bid below the market in its sales to CCC, gambling on a decline in market price. Such is not the fact. The raisin market had been falling ever since announcement of CCC's program on September 5. On the morning of September 8, 1947, the price of packed processed raisins dropped from \$.095 per pound to \$.085 per pound and by the time bids were submitted under Announcement No. 1, had further declined to \$.08 per pound (Pl. Ex. 21; R. 182-183). Substantially all trading in raisins prior to the receipt of bids under Announcement No. 1 was for early season delivery (Def. Ex. K). Such early deliveries command premium prices and cannot be compared with general sales which normally commence in early October (R. 105). What then was the market at the time bids were made to CCC? The court found that the accepted "spread" between the price of packed processed raisins and natural condition raisins was slightly in excess of \$40 per ton and that offers by independent packers and Sun Maid under Announcements No. 1 and No. 2 reflected a field price of approximately \$110 per ton (Finding 23). What better evidence of the field market could there be than Sun Maid's sale of 20,000 tons of raisins to CCC (Pl. Ex. 54)?* Sun Maid is a grower cooperative and its sales to CCC are the best available indication of the growers' opinion of "the market." Rosenberg did not relish

*These sales were made at the following prices: 10,000 tons at \$153.33 on September 24, 1947 reflecting a field price of \$113.33, and 10,000 tons at \$145.48 on October 14, 1947, reflecting a field price of \$105.48.

the short position which was forced upon it and objected vociferously (R. 384-385), but felt that its position in the industry necessitated its cooperation with the Department if surplus conditions were to be alleviated (R. 198-200).

Because of the soft market conditions resulting from CCC's announced program, radio and press protests resounded throughout the San Joaquin Valley. The Department refused to change its announced program in spite of grower and packer protests. A mass meeting of thousands of producers was held in the Fresno Auditorium, at which Setrakian urged growers not to sell and Sheridan Downey, then U. S. Senator from California, and others promised to intervene in Washington (R. 112-113, 203-205).

Downey did intervene with CCC officials in Washington in early October, 1947. He testified that at his meetings, he was informed by them of the "low and favorable bids" they had received from packers who had offered raisins on the basis of the original purchase program. They recognized that packers had sold short and would be faced with heavy deficits if the purchase program were increased. Downey suggested releasing the packers from their bids, but, while Board members recognized the inequity of holding packers to their low bids, they told him that the Secretary of Agriculture was very happy about the contracts with packers and did not want to "let the packers out" (R. 115-119). Downey was informed a few days later that Secretary Anderson had rejected the unanimous recommendation of the Board of CCC to purchase an additional 60,000 tons of raisins. Downey then appealed to the President for aid (R. 119-122).

On October 9, 1947, while the bids of packers (including Rosenberg) made under Announcement No. 2 were still pending, CCC planned a complete revision of its raisin program but gave no notice of that change to anyone outside the Department of Agriculture. This change was made with the knowledge that it would catch the packers whose bids had been accepted by CCC in a

squeeze (R. 144-148). CCC nevertheless accepted the pending bids by night letter sent on October 13, 1947 (Pl. Ex. 16) and received by the packers on October 14. After it had contractually bound these packers to their low bids in this manner, on October 14, 1947, CCC announced changes in its program, the inevitable and planned effect of which was to increase the field price of raisins to these very same packers who had sold short to CCC (Findings 25, 26, 27, 28, 29, 30, 34).

This really shocking conduct of CCC is confirmed by the record. On October 9, 1947, the CCC Board in secret session adopted a resolution (Pl. Ex. 5; Def. Ex. M) "to increase the maximum quantity of raisins purchased to 121,000 tons." This change was not disclosed until October 14, 1947, after the low packer bids received under Announcement No. 2 had been accepted. Only then did the Department of Agriculture make public the changes in CCC's 1947 raisin purchase program (Pl. Ex. 19). The changes announced were even more drastic than the resolution adopted by the Board of Directors on October 9 indicated. The announcement not only invited offers for an additional 60,000 tons of raisins, but it requested offers to CCC from raisin producers and others in physical possession of raisins, thus putting CCC into direct competition with packers (who had not yet covered their prior commitments to CCC) for raisins in the field.* Further details of the changes in CCC's purchase program were announced on October 17, 1947 (Pl. Ex. 25).

The net result of these drastic changes was to put CCC in the market for the *entire* raisin surplus. (121,000 tons even exceeded earlier surplus estimates.) Rosenberg and other packers had based

*It is also worthy of mention that the Department's October 14 announcement (Pl. Ex. 19) declared that CCC had bought 31,000 tons of Thompson seedless raisins, and that a grand total of 112,568 tons of dried fruits had been purchased from processors and packers "since *offers to purchase* were originally announced by the Department on *September 5*." (Emphasis added.) This is but a further illustration that the September 5 announcement was made to be relied upon and acted upon by processors and packers.

their bids on a program which was to take only 61,000 tons out of an indicated surplus of 100,000 tons, leaving an estimated surplus of some 40,000 tons overhanging the market. By the announced changes, CCC also put itself into direct competition with packers (who, as CCC knew, were in short position on their prior sales to CCC) to obtain natural condition raisins from producers.

Immediately upon learning of the changes in CCC's raisin purchase program, on the morning of October 14, Rosenberg sent a telegram to Clinton Anderson (Pl. Ex. 17) requesting cancellation of its two contracts with CCC (Finding 31). This telegram declared that Rosenberg's sales to CCC had been made in reliance upon the Secretary's announcement of September 5 and upon the stated limits on quantities to be purchased, and that Rosenberg had taken into consideration the known size of the 1947 raisin crop, the Secretary's declaration that no support price would be established, the Department's request for Rosenberg's cooperation, and the need for re-establishing domestic consumption in reasonable volume. Rosenberg also referred to the short position of itself and other processors, and mentioned the repeated insistence of Department officials that there would be no change in the raisin purchase program as announced. This telegram was supplemented on the following day by a further telegram informing Secretary Anderson that Rosenberg was willing to cancel all of its existing *grower* contracts for raisins that called for firm prices of less than \$140 per ton (Pl. Ex. 18). Cancellation of these contracts would have enabled the released *growers* to enjoy the benefits of CCC's new program.

Secretary Anderson testified that he referred these telegrams to the Fruit and Vegetable Branch and to his legal advisor for report (R. 402). The report (Pl. Ex. 50) which finally reached the Secretary's hands was made by S. R. Smith, Director of the Fruit and Vegetable Branch of PMA. Smith was the author of the dried fruit docket, and his branch was in charge of CCC's purchases

under it. Perusal of his report discloses that the Department was well aware of the packers' short position at the time it changed CCC's 1947 raisin purchase program. Mr. Smith also recognized that the announced changes had materially interfered with packer efforts to cover their CCC commitments as trading in raisins had been practically at a standstill since the October 14 announcement, and growers were not inclined to sell to packers in view of the impending purchase of raisins by CCC *directly from growers*. Smith pointed out that processors whose offers had been accepted by CCC

"feel that the Department has not dealt fairly with them because of accepting the offers submitted at low prices based upon a CCC purchase of 61,000 tons, and immediately thereafter putting a squeeze on them by (1) increasing the quantity to be purchased by 60,000 tons, and (2) inviting producers, from whom processors have to acquire unprocessed fruit to submit offers."

He then stated that requests for renegotiation or cancellation had been received from *10 of the 13 contracting processors*.^{*} Smith recommended renegotiation of the existing contracts between CCC and processors covering the first 61,000 tons purchased so that prices to be paid thereunder would permit the packers to pay producers not less than \$135 per ton for natural condition raisins. At the trial, Smith, a studious and careful witness, declared that he had prepared this report after full consideration of the facts then before him, that he felt his recommendations were the best solution at the time, and that at the date of trial he had not changed his conclusions that the contracts between CCC and the processors should have been renegotiated at a higher price (R. 567-570).

Smith's recommendations were rejected at a meeting of the

^{*}West Coast, one of the 13 contracting processors, had been granted a contract for only 70 tons; and Lion, another, had received a contract for only 100 tons (Pl. Ex. 54). Sun Maid, a cooperative, was not in a short position because of tonnage held by its grower-members. In other words, there were ten packers with a substantial stake and there were ten protests.

Board of Directors of CCC held on October 27, 1947, at which Secretary Anderson occupied the chair (Pl. Ex. 49; R. 405). This decision of the Board is in marked contrast to the attitude of the Board members expressed to Senator Downey when he met with them on October 9. At that time several of those present indicated knowledge of the packers' position as well as of the inequity of increasing CCC's purchases (R. 115-119). The record discloses no reasons why the Board rejected Smith's proposals but is replete with references to reasons why the Secretary of Agriculture opposed them.

The Secretary's reasons for holding the packers to their contracts are indicative of the nature of the whole transaction. This was a business deal, pure and simple, and was so treated by the Department and by CCC. Appellant cannot now hide behind the cloak of sovereignty. The Secretary indicated that packer bids in response to Announcements No. 1 and No. 2 were lower than he had expected. He had looked for bids in the neighborhood of \$175 per ton, reflecting a return to growers of approximately \$135 per ton (R. 448). Instead, bids came in at a level of approximately \$150 reflecting a return of \$110 to growers. If the Department's purpose was price support, as counsel for Appellant now so staunchly maintains, release of packers from their CCC contracts, as requested by Rosenberg in its telegrams of October 14 and 15, would have effectuated that purpose. But Secretary Anderson had indicated that he wanted CCC to purchase raisins at a price at which they could be resold in foreign countries with unfavorable exchange rates and to the Armed Services ("a tough trader"), and he was satisfied with the bids made. He testified that he regarded the deal as an "ordinary business proposition" (R. 402), that "as a business proposition, a free bid had been made" and the bidder must abide by it (R. 404). Rosenberg's bid was the lowest bid, and while he could have rejected a bid near the upper limit, he was reluctant to cancel a low bid for which other bids could not

be substituted (R. 404).^{*} The Secretary believed he was bound to account to the General Accounting Office for all CCC transactions, and that all such transactions would be carefully scrutinized by the Controller General, and he wanted to be very sure his actions would not subject *him* to criticism (R. 403). Moreover, he had been advised by the Solicitor of the Department of Agriculture that he could not cancel the packer contracts and substitute higher bids because it would be to the financial disadvantage of CCC (R. 403-404).

Accordingly, on November 6, 1947, Secretary Anderson, ignoring Smith's recommendations, refused Rosenberg's request for cancellation, and informed Rosenberg that he would await return of offers under the Department's changed program before determining whether further modifications would be made (Pl. Ex. 23).

Rosenberg had been unable to acquire sufficient natural condition raisins to cover its CCC commitments prior to the changes announced on October 14, 1947. Thereafter growers turned strong holders, partly because of the urgings of grower groups, and partly in expectation of direct sales to CCC at high prices. Grower bid forms became available on November 5, and the large tonnage offered to CCC by growers was removed from the possibility of packer purchase (Pl. Ex. 44). On November 26, 1947, CCC itself rejected *all* grower offerings because they had been made at "prices in excess of \$135" per ton (Pl. Ex. 24). Certainly, packers could not have been expected to cover their CCC commitments at prices so ridiculously high that even CCC rejected them.

On November 26, 1947, the Department announced that in the future CCC would require all processors selling raisins to CCC to certify that they had paid not less than \$135 per ton for natural

^{*}Even if the Secretary's reasoning is valid, the facts do not bear him out. While Rosenberg was low bidder under Announcement No. 1, it was the high bidder under Announcement No. 2 (Pl. Ex. 54). Packers near the upper limits on the first call also requested cancellation, but Secretary Anderson rejected *all* such requests.

condition raisins used in processing packed processed offerings to CCC (Pl. Ex. 24). The announcement of the \$135 certification requirement, coupled with CCC's rejection of all grower bids because they exceeded \$135 per ton, indicated for the first time what price level CCC considered fair, and the field market accordingly stabilized at approximately \$135 per ton (which reflected a price of \$175 per ton for processed raisins) (Pl. Ex. 44). The certification requirement, in effect, placed a support price of \$135 per ton on natural condition raisins, and violated the terms of the September 5 announcement that prices would *not* be supported at any given level (Finding 34). Rosenberg bought heavily while the market remained at this level.

Meanwhile, in November, Dwight Grady made a trip to Washington seeking either renegotiation of price or cancellation of Rosenberg's CCC contracts (R. 239 et seq.). His trip proved unsuccessful, and on December 2, 1947, Dave Davidson, Administrator of CCC, in a telegram, refused the relief sought and informed Grady that CCC considered the Rosenberg contracts in full force and effect and expected delivery thereunder (Pl. Ex. 26).

Grady was dismayed by this response and called Secretary Anderson by telephone on December 4, 1947. Anderson indicated that renegotiation of price was possible, and told Grady to work out his claim with Dave Davidson (Pl. Ex. 27). In accordance with the Secretary's suggestion, Grady again telegraphed Davidson asking for a price adjustment (Pl. Ex. 28). Davidson's reply, dated January 21, 1948 (Pl. Ex. 29), took the position that Rosenberg was under obligation to deliver pursuant to its CCC contracts. Until this time Rosenberg had consistently refused to honor CCC's delivery notices (Def. Ex. V, W). Grady had instructed Rosenberg's shipping department not to deliver at the time the first Notice to Deliver was received from CCC (October 16, 1947). In the first instance, Grady had told Laflin, the head of Rosenberg's Shipping Department, to inform CCC that Rosenberg "didn't have the raisins" (R. 296; Pl. Ex. 20). After that, it became a

routine matter until new instructions were issued (R. 300-302). Laflin filled out and forwarded the mimeographed forms prepared in advance by the Shipping and Storage Branch of PMA for all packers (Def. Ex. W; R. 634). In using mimeographed letters in lieu of shipping notices, PMA obviously anticipated a refusal to deliver. Grady testified that Rosenberg progressively acquired raisins, and that he did *not* continue to tell Laflin at the time each delivery was refused, that Rosenberg did not have the raisins, but merely told him not to ship while he was attempting to have the CCC contracts cancelled (R. 318). Rosenberg's refusal to deliver during this period was based on its desire to protect its contractual position, as well as to leave open the possibility of renegotiation or settlement of its CCC contracts (Finding 38).

On January 22, 1948, Laflin, pursuant to Grady's instructions, informed CCC that Rosenberg was now in a position to make deliveries against its CCC Contract 1647* and requested reinstatement of its tonnage (Pl. Ex. 30). On January 23, Grady wrote Senator Downey asking for his help, and mentioning Rosenberg's loss of \$315,000 on its CCC sales (Pl. Ex. 31).

Several days later, Werner Allmendinger, a contracting officer for CCC, sent a telegram dated January 26, 1948, to Rosenberg (Pl. Ex. 32) citing Rosenberg's failure to honor CCC's prior delivery notices under Contract 1647 and referring to the mimeographed letters filled in by Laflin (Def. Ex. W). He then inquired whether Rosenberg would deliver if it received other notices to deliver provided that no damages for nondelivery would be sought by Commodity Credit Corporation other than waiver of carrying charges on all raisins covered by Contract 1647; asked Rosenberg's advice as to its intention to deliver under Contracts 1647 and 1893†; and stated that CCC was willing to take delivery under

*Contract 1647 covered the raisins included in Rosenberg's first offering to CCC.

†Contract 1893 covered the raisins included in Rosenberg's second offering to CCC.

both contracts at the contract price, and that the only price increase would be \$0.0005 per pound for raisins packed in export containers. He advised Rosenberg that CCC would not pay carrying charges on raisins covered by Contract 1647 and asked that Rosenberg indicate its agreement to the arrangements set forth or otherwise indicate its intention as to performance. After a number of telephone conversations (R. 269 et seq.; 603 et seq.), Rosenberg by a series of telegrams agreed to *ship* under both its CCC contracts (Pl. Ex. 32-36).^{*} Grady unequivocally testified that he told Allmendinger that he was unwilling to prejudice his company's claim against CCC, and further stated that he did not intend to waive Rosenberg's claim by sending the telegrams or by agreeing to ship (R. 276-277). The court found that Rosenberg neither expressly nor impliedly waived its rights to claim damages against CCC by its agreement to ship (Finding 39). The specific nature of the telegrams sent and Grady's conduct immediately before and after the exchange of telegrams are completely inconsistent with waiver.

On January 30, 1948, the day after Grady sent the last telegram to Allmendinger, he received a telegram from Senator Downey (Pl. Ex. 37) stating that Downey was looking into Rosenberg's claim and would report developments. Grady did not tell him to terminate his efforts or indicate the possibility that Rosenberg had waived any of its rights. On the contrary, he immediately telephoned Downey and at Downey's suggestion again made a trip to Washington to press Rosenberg's claim (R. 278-279). He conferred with Department of Agriculture officials and was advised that Rosenberg should file a formal claim. Grady spent the next several days with his counsel preparing the claim, but submitted it first to Senator Downey because of his reluctance to file such a document which reflected on the reputations of persons in high

^{*}These telephone conversations and telegrams will be discussed in greater detail in connection with Appellant's waiver defense, *infra*.

places (R. 279-282). After consultation, it was decided that the only course was to file the claim, and it was filed with S. R. Smith on February 26, 1948 (Pl. Ex. 38). Additional information was furnished in support of the claim at a later date (R. 284). Grady pressed the claim whenever he was in Washington, and in September, 1948, visited Clinton Anderson, then a Senator, in New Mexico, and subsequently corresponded with Anderson about their December, 1947, telephone conversation in which Anderson had discussed renegotiation of price (R. 284-292). On February 8, 1949, Senator Anderson wrote the Office of the Solicitor of the Department of Agriculture about Rosenberg's claim (Def. Ex. H) stating that his correspondence with Grady was not as full as it might be because he felt Grady was getting ready to sue the Department of Agriculture, and he would prefer to give his material from the witness stand. Senator Anderson further stated that he would like to see justice and equity done to Rosenberg and felt its claim should be negotiated. Anderson did not mention waiver, and Rosenberg's preparations to sue were, of course, inconsistent with waiver.

On October 13, 1949, Smith denied Rosenberg's February 26, 1948, claim (Def. Ex. I). The denial did not mention waiver and in fact referred to supplemental letters indicating active support of the claim. After Smith's denial, Grady saw the new Secretary of Agriculture, and at his suggestion voluntarily submitted Rosenberg's claim to the Contract Disputes Board of CCC (R. 293).^{*} For the first time, at the hearing before that Board on April 26, 1950, government counsel charged that Rosenberg had waived its rights. After denial of Rosenberg's claim by the Contract Disputes

^{*}The Contract Disputes Board was composed of the officials of the same Department which had already turned down Rosenberg's claim, and its legal advisor was the Solicitor of Agriculture who had advised the Secretary to reject the claim. The hearing was a closed one, and Rosenberg had no opportunity to cross-examine witnesses. Nevertheless, Rosenberg appeared and presented its case because it had every wish to cooperate with Department officials before seeking legal redress.

Board, the present action was filed. Rosenberg's unbroken course of conduct is completely inconsistent with any waiver of its rights, and amply supports the finding of the trial court that there was no waiver (Findings 39, 41).

SPECIFICATION OF ERROR ON CROSS-APPEAL

- (1) The District Court erred in holding that Rosenberg covered its CCC commitments after December 12, 1947.
- (2) The District Court erred in not including raisins costed before December 12, 1947, in calculation of Appellee's damage.
- (3) The District Court erred in not costing the raisins delivered to CCC by Rosenberg either on a first-in first-out basis, or on an average cost basis.

SUMMARY OF ARGUMENT

Proprietary Nature of CCC's Conduct

Rosenberg's contracts with CCC were commercial purchases of raisins by a governmental agency for certain limited puposes. The actions of CCC which hindered performance by Rosenberg and increased the cost of raisins acquired to fulfill its contract commitments to CCC were likewise commercial rather than sovereign in nature. Purchase of raisins and the imposition of a condition on delivery (certification that \$135 per ton has been paid to growers) are not "public and general" acts. Private contractors as well as government agencies could do the very same things. The court will not be misled by labels such as "price support," but will determine the nature of CCC's 1947 raisin purchase program from an examination of the testimony about its origin and operation. The record shows that low prices were obtained by competitive bidding. The Department of Agriculture regarded the low packer bids which CCC accepted as a closed business deal, and

refused to release Rosenberg from its contracts even though the result of such a release would have been higher prices to growers. The nature of CCC's conduct is a question of fact, and the District Court has already decided on substantial evidence that it was not sovereign (Finding 42). But even conceding the sovereign nature of CCC's conduct, CCC is nevertheless liable to Appellee under the facts of this case.

Breach of Implied Contract Not to Hinder or Render Performance More Expensive.

CCC's conduct subsequent to the execution of Rosenberg's contracts to deliver raisins to it undoubtedly made it more difficult and expensive for Rosenberg to cover its contract commitments. The tremendous increase in CCC's purchase program over the originally stated minimum of 61,000 tons, purchases by CCC from growers in direct competition with Rosenberg, and the requirement of the \$135 certification, which in effect supported field raisin prices at a level of \$135 per ton, all contravened the terms of the Secretary's September 5 announcement and contributed to Rosenberg's plight. In view of the unequivocal words of the September 5 announcement, and subsequent insistence by Department officials that there would be no change in the 1947 raisin purchase program as announced, Rosenberg when it entered into the contracts in suit, certainly did not "assume the risk" that the program would be altered in direct violation of the terms of that announcement. Appellee's argument on this point does *not* require a finding that the September 5 announcement constituted an enforceable *promise*. Nor does the decision of the District Court depend on any such premise. The court's finding that Rosenberg did not "assume the risk" of change (Finding 44) is equally supportable if the September 5 announcement be regarded as a *representation*, or only as an announcement of the "rules of the game." After such a representation, or under such rules, one contracting party does *not* assume

the risk that the other will do exactly what he states he will not do. Even if the other's statement is not itself regarded as an enforceable promise, it does define the limits of the other's implied promise not to hinder or obstruct performance.

Absence of Waiver.

Rosenberg did not waive CCC's breach of contract. Waiver is an affirmative defense to be established by defendant, and Defendant here has failed to sustain its burden. Moreover, waiver is a question of fact, and the findings of the District Court (Findings 39, 41) are supported by substantial evidence. There is no evidence of an express waiver by Rosenberg. There is affirmative evidence that Rosenberg preserved its rights and consistently pressed for relief. After CCC's breach, Rosenberg had an election either to perform and claim damages or to rescind. Rosenberg elected to perform and is entitled to recover its damages. Its right to make that election does not depend on whether its contract was profitable or not. This is not a case in which one party *repudiates* an *executory* contract, thus barring performance by the other. CCC did not repudiate, but insisted on performance by Rosenberg.

CCC expressly waived Rosenberg's failure to ship in accordance with the original shipping schedule in the exchange of telegrams between Grady and Allmendinger. In consideration for CCC's change of position, Rosenberg waived any claim for carrying charges. The specific nature of the expressed waivers negatives a general waiver of Rosenberg's claim for damages for breach of contract. CCC's reluctance to admit liability beyond the contract price is a far cry from Rosenberg's acceptance of CCC's position. CCC was unwilling to recognize Rosenberg's claim for damages, and Rosenberg was unwilling to abandon it. Under these circumstances, the parties agreed only to shipment, to a specific and minor alteration in price for export packaging, and to a waiver of carrying charges. Each retained whatever legal rights it otherwise had.

Rosenberg's Damages.

The court found, and there was substantial evidence in the record, that but for CCC's conduct in violation of its implied contract the price of natural condition raisins would have stabilized at \$110 per ton or less, and Rosenberg could have covered its CCC commitment at that level (Findings 24, 35). These are facts and if, as we contend, they are supported by substantial evidence, the Appellate Court will not substitute its judgment for that of the trial court. The trial court also found that the direct and proximate result of CCC's conduct in violation of its implied contract was to increase the field price of Thompson seedless raisins and render Rosenberg's performance more expensive (Findings 34, 36, 43). This is a finding of fact which should not be disturbed on appeal since there is substantial evidence supporting it.

The District Court erred, however, in looking only to raisins which Rosenberg costed after December 12, 1947, as a measure of its damage. There is uncontradicted evidence in the record that Rosenberg was acquiring raisins for its CCC contracts throughout the 1947 season as quickly as it could after its CCC contracts were made, and that it had costed all of the raisins necessary to cover its CCC commitments *before the end of January, 1948*. Such acquisition was in conformity with its normal business practice of acquiring and costing raisins to cover its sales commitments in the order in which they were made. Under the circumstances, Rosenberg's damages should have been measured by costing its raisin acquisitions on a first-in first-out basis, or in the alternative on an average cost basis. This is not a proper case for application of the "minimum cost" principle advanced by Appellant.

ARGUMENT

I. CCC Cannot Escape Liability for Its Action by a Claim that Its Conduct Was Sovereign Action.

A. THE EVIDENCE SHOWS THAT CCC'S CONDUCT WAS NOT SOVEREIGN ACTION.

Appellant attempts to hide behind the cloak of sovereignty by discussing the *general* nature of Commodity Credit Corporation and pointing out how CCC carries out its price support functions.* But the case before this court is not a "general" one. It arose on a specific set of facts. Appellant admits (1) that raisins are a non-basic commodity for which price support is not mandatory (App. Op. Br. p. 14) and (2) that in addition to its price support functions, CCC also carried on a supply program† and a commodity export program (App. Op. Br. p. 12). Admittedly, Congress has declared a policy that CCC, in carrying on its purchasing and lending operations in connection with nonbasic commodities, such as raisins, should conduct those functions so as to promote parity with other commodities to the extent funds are available (15 U.S.C. 713a-8(b); App. Op. Br. p. 14-15). But this does not make such purchasing and lending operations *per se* sovereign acts. The declared purpose is *supplemental* and *incidental* to a non-sovereign proprietary function of CCC. Procurement of supplies by contract is non-sovereign in character even where the supplies procured will be devoted to sovereign purposes, e.g., use of the Armed Services in national defense. Liability has been imposed on the United States, itself, in connection with such activity. See *Amoskeag Mfg. Co. v. U. S.* (1873), 84 U.S. (17 Wall.) 592, 21 L.Ed. 715, where the United States was held liable on a contract to purchase carbines for the Army in spite of the fact that a change in design (in the interest of national defense) ordered by the United States prevented the manufacturer from delivering within the six-month

*In so doing, Appellant even resorts to a budget estimate which is not in evidence (App. Op. Br., p. 12).

†Procurement for government agencies, Armed Forces, etc.

period specified in the contract; *U. S. v. Peck* (1880), 102 U.S. 64, 26 L.Ed. 46, where the Court held that the purchase of hay by the United States for an Army fort from the only available local source interfered with performance by a contractor who had agreed to deliver hay to the fort, and violated the implied contract of the United States not to hinder his performance, thus releasing the contractor from liability for failure to deliver; *U. S. v. Smith* (1876), 94 U.S. (4 Otto) 214, 24 L.Ed. 115, where the United States was held liable like a private contractor for damages occasioned by a suspend order under a contract for construction of buildings at an Army fort; and *Reiss & Weinsier v. U. S.* (Ct. Cl. 1953), 116 Fed. Supp. 562, where the United States was held liable for suspension and cancellation of a contract for construction of public housing.

The liability of CCC for its actions in this case is further illustrated by *Beuttas v. U. S.* (Ct. Cl. 1944), 60 Fed. Supp. 771 (cited in App. Op. Br. p. 29). The court there held that the action of the United States in advertising for laborers to work on the superstructure of a building for higher wages than the plaintiff contractor was paying for laborers working on a contract with the United States to complete the substructure imposed liability on the United States to compensate the contractor for increased wage expense occasioned by the government's action. The basis of the decision was the government's violation of its implied contract not to make the plaintiff's performance more difficult or expensive. In reversing the Court of Claims, the United States Supreme Court, *U. S. v. Beuttas* (1945), 324 U.S. 768, 89 L.Ed. 1354, did not question the existence of the implied contract or the non-sovereign nature of the government's action, but based its decision solely on the ground that payment of higher wages on the superstructure was *not the proximate cause* of the contractor's increased cost.

In none of the cited cases was the United States allowed to avoid the consequences of its *contractual* actions (changing contract

specifications, purchase of hay, interference with performance by suspension, hiring labor at higher wages) on the ground that its acts were sovereign. These cases control in the present action.

The court will not be misled by the "price support" label on Docket OC-95a. In the first place, the Docket was a secret document, the distribution of which was confined to Department of Agriculture officials (R. 163-164). The public announcement of the raisin purchase program (Pl. Ex. 4) stated that prices would *not* be maintained at any given level, but that the program would enable the *industry itself* to complete plans for readjustment on a self-help basis. In the second place, the Docket placed a maximum limit of 133,000 tons on dried fruit purchases, and the announcement of its general terms (Pl. Ex. 4) stated that 61,000 tons was the portion of this maximum allocable to raisins. Why was this maximum adopted? Secretary Anderson and the Docket itself answer this question. Only a limited quantity of raisins was to be purchased for certain enumerated outlets. CCC was not to purchase an unlimited quantity to support prices. There was to be no stock-piling of surplus raisins. Secretary Anderson was not going to repeat the mistakes of the potato program (R. 354-356). All raisins acquired were to be received by or for the account of CCC and *disposed of by sale*, in the following channels:

(a) Sales to Section 32 and to United States Government agencies other than for export.

(b) Sales for export, to foreign governments and their purchasing agents, to United States Government agencies for foreign relief feeding, to public international organizations like the United Nations, to private domestic exporters, and to foreign importers.

(c) Sales in domestic commercial channels for human consumption, where possible without depressing the domestic market.

(d) Sales in domestic commercial channels for disposal other than as human food, if not fit for human consumption.

Whether or not purchase for these purposes was designed to produce profit or income for the United States is immaterial in passing on the nature of the purchases. The fact is inescapable that CCC in purchasing raisins for these designated purposes was exercising a *procurement function*. Removal of part of the surplus was an *incidental* effect, and does not change the essential nature of the operation; nor does the "hope" of the Department of Agriculture (Pl. Ex. 4) that CCC purchases would enable the dried fruit industry to complete its readjustment on a self-help basis.

If the primary purpose of CCC was to support prices, it could have made unlimited purchases at a fixed price. But this was not CCC's purpose in acquiring raisins in 1947. To use Secretary Anderson's own words, CCC would take raisins only at prices at which they could be moved to foreign countries with an exchange problem or could be sold to the Army which was "somewhat of a tough trader" (R. 360). To accomplish its purpose of procuring raisins at the *lowest* prices at which it could obtain them, CCC called for *competitive bidding* and accepted the *low* bids. When bids under Announcement No. 1 came in at lower levels than Secretary Anderson expected, CCC, as it had a right to do, could have rejected all bids. It was importuned to do so by the unsuccessful bidders, but instead asked the *low* bidders for an extension of time and accepted their bids (Pl. Ex. 11, 12, 54; R. 367). When it was apparent that bids under Announcement No. 2 would be even lower because of the competition of the unsuccessful bidders under the first call, CCC nevertheless again asked for bids, and when the bids did come in at a lower level, accepted them (Pl. Ex. 54). Senator Downey testified that he was told that Secretary Anderson was happy over the low bids the packers had made and "didn't want to let the packers out of their contracts" (R. 118); and that CCC was trying to save money and had obtained "valuable" and "economical" contracts on the basis of its representation that it would buy only 60,000 tons (R.

143). When Rosenberg offered to cancel all its grower contracts at prices under \$140 per ton if CCC would release Rosenberg from its CCC commitments (Pl. Ex. 17, 18), CCC and Anderson refused cancellation in spite of the fact that cancellation would have allowed growers to get a better return, i.e., would have supported prices. Anderson gave as some of the reasons for his refusal that "This was an ordinary business transaction" (R. 402); that "as a business proposition" he would not cancel the Rosenberg contracts because a free bid had been made and those people must abide by it (R. 404); furthermore that cancellation would not be to the "financial advantage" of CCC (R. 450-453). When CCC altered its program and grower bids came in at relatively *high* levels, CCC did reject *all* bids because prices exceeded \$135 per ton (Pl. Ex. 19). CCC as a *business* matter was unwilling to pay such prices for raisins. Throughout the operation of the 1947 raisin program CCC's conduct was that of a businessman anxious to obtain raisins at a good price for disposition in accordance with a pre-conceived plan in certain designated channels. This is not "sovereign action."

B. CCC'S ACTIONS IN BREACH OF ITS IMPLIED CONTRACT WERE NOT "PUBLIC AND GENERAL" ACTS.

What is the action of CCC which plaintiff claims was an actionable breach of contract?

(1) On October 14, 1947, CCC announced that it would increase its raisin purchase program to 121,000 tons—60,000 tons more than the maximum announced on September 5, 1947—a figure large enough to remove the *entire* surplus from the market and in sharp contrast to its original plan of purchasing only *part* of the surplus.

(2) CCC also announced that it would purchase raisins directly from *growers* in competition with Rosenberg and other packers, a violation of its September 5 representation that it would purchase *only* from packers.

(3) On November 26, 1947, CCC announced that processors and packers would be required to certify they had paid no less than \$135 per ton to growers on all future offerings to CCC, a violation of its September 5 representation that it would not maintain prices at any given level.

All of these announced changes were subsequently executed by CCC. *Every one of these actions could have been taken by a private contractor.* They are obviously not "sovereign" in their nature.

The accepted test of the liability of a governmental body, voiced in *Horowitz v. U. S.* (1925), 267 U. S. 458, 69 L.Ed. 736, is that *in the absence of an express agreement or representation, the United States is not liable for its "public and general" acts as a sovereign.* The "public and general" act before the court in that case was an embargo on the shipment of silk. The embargo applied to *all* shippers and was of a mandatory and legislative character. The government had made no representation or announcement that it would not embargo silk. The purchase of raisins and the imposition of contract conditions is activity of a completely different nature. Sovereign act might be a defense (in the absence of any agreement or representation) if Rosenberg's performance had been hindered by such "public and general" acts as an embargo on the shipment of raisins, a general increase in the ceiling price of natural condition raisins, a priority system for packaging materials, or seizure for violation of the Food and Drug Act. None of these acts could have been performed by a private person; they were inherently governmental in nature. But any private contractor with enough capital could have increased its raisin purchases by 60,000 tons, and any private contractor could have altered its purchasing methods and dealt directly with growers, or imposed as a condition to purchase a certification that raisins had been acquired from growers for at least \$135 per ton.

This is conduct "ordinarily engaged in by private individuals." (This test is proposed in Appellant's Opening Brief at pp. 22-23.) There is no doubt that a private contractor would be liable for such conduct. It does not become sovereign merely because CCC was an agency of the United States. In performing these acts, CCC was merely exercising its charter powers as a Delaware corporation: "to purchase, or otherwise to acquire, to hold or otherwise deal in, to sell or otherwise dispose of any and all agricultural and/or other commodities * * *" (Def. Ex. AJ, Article Third (b)).

The spurious nature of Appellant's argument that the test of sovereign action is whether the activity is carried on for profit (App. Op. Br. pp. 22-23) is apparent from the various examples of so-called "governmental action" which it lists—the operation of schools, art galleries, swimming pools, slum clearance, and the lighting of streets. It is common knowledge that a municipality or other governmental body is bound by its *contract* for construction of a school or swimming pool, or the cleaning of an art gallery, or the erection of street lights. Sweeping statements are of no help. The court must examine the nature of the very transaction before it. *U. S. v. Turlock Dehydrating & Packing Co.* (D.C. Cal.), 116 Fed. Supp. 822, cited on page 29 of Appellant's Opening Brief for the proposition that a price support program is of a sovereign nature, is easily distinguishable because of the nature of the transaction before that Court. It merely held that *subsidy payments* by CCC to packers to enable them to sell processed raisins at OPA ceiling prices, when the cost of raisins in the field would not otherwise allow sale at such a level, was sovereign action. Consequently, a state statute of limitations did not bar a suit by the United States to recover subsidy payments made on poor quality raisins. The payment of subsidies to all who qualify is inherently a governmental function, and would not be undertaken by a private person. The *Turlock* case is not concerned

with the type of CCC activity of which Rosenberg complains, nor does it even consider the liability of a government agency to a private litigant for breach of its implied contract not to hinder or render more expensive the other contracting parties performance.

C. CCC IS LIABLE, LIKE ANY OTHER PRIVATE CONTRACTOR, IN ITS COMMERCIAL TRANSACTIONS.

A government agency is subject to the same rules of law as any other private corporation when it acts in the commercial sphere and does not exercise sovereign powers of government.

U. S. v. Skinner and Eddy Corp. (W.D. Wash. 1928) 28 F.2d 373, 385, *mod. on other grounds* (C.C.A. 9, 1929) 35 F.2d 889;

R. F. C. v. J. G. Menihan Corp. (1941) 312 U.S. 81, 85 L.Ed. 595.

Even the United States Government itself is liable for its actions as a contractor, performed in its proprietary, as distinguished from its sovereign capacity.

Horowitz v. U. S. (1925) 267 U.S. 458, 461, 69 L.Ed. 736, 737;

Maxwell v. U. S. (C.C.A. 4, 1925) 3 F.2d 906, 911, *aff'd* (1926) 271 U.S. 647, 70 L.Ed. 1130.

D. ACTIONS BY THE SAME FEDERAL AGENCY WITH WHICH A CONTRACTOR HAS MADE HIS AGREEMENT ARE VIEWED IN A DIFFERENT LIGHT FROM ACTIONS OF A SEPARATE AND INDEPENDENT GOVERNMENT AGENCY.

The actions which the District Court found were in breach of CCC's contract are actions of the very same agency with which Rosenberg made its contract. The September 5 announcement was made by the Secretary of Agriculture who was also Chairman of the Board of CCC, on behalf of CCC; the contracts in suit were made by the Fruit and Vegetable Branch of PMA, on behalf of

CCC; the acts which the court found breached CCC's implied contract were additional purchases of raisins by CCC, purchases by CCC directly from growers, and the requirement by CCC of a certification on all sales to CCC that growers had been paid \$135 per ton.

Beuttas v. U. S. (Ct. Cl. 1948), 77 Fed. Supp. 933, 936 (not to be confused with the *Beuttas* case discussed *supra* p. 28), in holding the United States liable, distinguished the *Horowitz* case and other sovereign act cases on the ground that:

"* * * in all of those cases the contracting officer had nothing whatsoever to do with the acts complained of, while in the present case it was the very department of Government that entered into the contracts with plaintiffs that directed the plaintiffs to work forty-eight hours per week rather than forty hours."

E. CCC'S EXPRESS REPRESENTATIONS RENDER IT LIABLE TO PLAINTIFF EVEN IF ITS ACTIONS WERE SOVEREIGN IN NATURE.

Even if it be conceded for purposes of argument that CCC's conduct was sovereign in nature, it does not necessarily follow that *under the facts of this case*, CCC can escape liability to plaintiff. Sovereign action by a governmental agency *under contract* differs markedly from sovereign action where there is no contract.

The express representations contained in the September 5 announcement make this case very similar to *Gerhardt F. Meyne Co. v. U. S.* (Ct. Cl. 1948), 76 Fed Supp. 811. The plaintiff in that case was a contractor who had agreed to perform certain construction on a military reservation. The contract specifications contained the following clause:

"S.C. 13. Entrance for trucks shall be at South Gate of reservation, over Walker Avenue, Highwood, Illinois, via Patten Road to site. * * *"

When military authorities closed the south entrance of Patten Road, it became necessary for plaintiff to construct and pave addi-

tional roads for access to the building site. The court regarded the quoted language as a representation (on which plaintiff's bid was based) that the listed roads were available and gave plaintiff judgment for its extra expenses in road construction and paving. It assumed that the action of the military authorities in closing the south entrance of Patten Road was sovereign, and stated:

"* * * Defendant *represented* these roads would be available from which it is to be *implied* that if they would not, the Defendant would stand the increased cost.

"Defendant cannot enter into a binding agreement that it will not exercise a sovereign power but it can say, if it does, it will pay you the amount by which your costs are increased thereby". (*Id.* at 815; Emphasis added.)

See also

Sunswick Corp. v. U. S. (Ct. Cl. 1948), 75 Fed. Supp.

221, 228, *cert. den.* (1948) 334 U.S. 827, 92 L.Ed. 1755;

Stafford v. U. S. (Ct. Cl. 1947), 74 Fed. Supp. 155;

York Engineering & Construction Co. v. U. S. (Ct. Cl.

1945), 62 Fed. Supp. 546, *cert. den.* (1946) 327 U.S.

784, 90 L.Ed. 1011;

Bostwick v. U. S. (1876), 94 U.S. 53, 24 L.Ed. 65.

All of these cited cases held the United States liable for sovereign action on the basis of its contractual representations, stating that liability rested on the *contract* rather than upon the act of the government in its sovereign capacity.

The court should follow the doctrine of these cases in deciding this appeal, since Rosenberg, in the instant case, made its CCC contracts in reliance on CCC's representations that it would purchase no more than 61,000 tons of raisins in the 1947 crop season, that its purchases would be made from packers but not from growers, and that it would not support prices at any given level. CCC's contemporary references to the September 5 announcement

(*infra* p. 58) show that CCC itself regarded the announcement as an integral part of its raisin purchases, and intended that packers rely on it in making their bids.

F. APPELLANT'S AUTHORITIES DO NOT CONTROL IN THIS CASE.

Appellant cites *Cherry Cotton Mills v. United States*, 327 U.S. 536 (App. Op. Br. p. 23) for the proposition that *all* acts of the federal government are governmental in nature even though performed by federal agencies and instrumentalities. It follows that with a statement that the government is not liable for damages resulting from performance of its sovereign functions (App. Op. Br. p. 25). The third line of this preposterous syllogism is not supplied. If these statements were true, the United States would *never* be liable for *any* of its acts!!!

But the *Cherry Cotton Mills* case does not stand for the proposition for which it is cited. It merely involves the right of the United States to offset a processing tax refund against a loan due it from a processor. The court confines its opinion to the counterclaim situation and at 327 U.S. 540 specifically states:

"The Government here sought neither immunity nor priority. Its right to counterclaim rests on different principles
* * *."

An intergovernmental tax immunity case such as *Fed. Land Bank v. Bismarck Lumber Co.* (1941), 314 U.S. 95 (App. Op. Br. p. 23), which involves the immunity of a Federal Land Bank from a state sales tax is completely irrelevant in a case such as the instant one involving *contract* liability of an independent corporate instrumentality of the United States. Moreover, in the *Bismarck Lumber Co.* case, a Congressional statute required the immunity from state taxation. Here, by statute, CCC may sue and be sued on its contractual commitments.

The general language which Appellant quotes from *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (App. Op. Br. p.

24) is equally inapplicable to the facts before this court. The holding of the court in the *Merrill* case was merely that a farmer could not rely on the erroneous representation of an official of the Federal Crop Insurance Corporation as to the coverage of an insurance policy, where Wheat Crop Insurance Regulations (published in the Federal Register*) made a crop uninsurable. The quoted language refers to that situation—the liability of a principal for representations of its agent where the representations conflict with published limitations on the agent's authority, and the publication gives legal notice of the contents of the regulations.

Demings Case, 1 Ct. Cl. 190, and *Jones and Brown's Case*, 1 Ct. Cl. 383, cited on page 25 of Appellant's Opening Brief, concededly involved the performance of sovereign functions: the imposition of additional duties, the passage of the Legal Tender Act and the withdrawal of federal troops from Indian territory. How different these public and general acts are from the contractual acts of CCC in this case!

Grant v. T.V.A., 49 Fed. Supp. 564 (App. Op. Br. p. 26) bears out this distinction. The court in that case held that T.V.A. was not liable for crop damage resulting from its activities in control of flood waters and in promotion of navigation, activities entirely dissociated with any business in competition with private enterprise. These are functions which *only* government could perform. But when Appellant cited this case, it failed to mention the remainder of the court's opinion in which it stated that T.V.A. is liable for all wrongs pertaining to the generation, use, and sale of the electric energy created by its dams since

"the functions of the defendant in the commercial field are entirely different. Upon principle and authority it is quite clear that the government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens." (49 Fed. Supp. at 566)

*Title 44 U.S.C. § 307 provides that appearance of regulations in the Federal Register gives legal notice of their contents.

In citing *Commonwealth Finance Corp. v. Landis* (D.C. Pa.), 261 Fed. 440 (App. Op. Br. p. 26), Appellant also ignores the court's language (261 Fed. at 443) that insofar as the Emergency Fleet Corporation is acting as a private corporation, and insofar as its assets are used as private property, it is *not* immune from the liabilities of a private litigant.

In *Standard Accident Ins. Co. v. U. S.* (Ct. Cl.) 59 Fed. Supp. 407 (App. Op. Br. p. 28) a lump sum contractor with the United States was denied recovery against the United States for higher labor costs incurred when it became necessary for him to pay overtime to meet the competition of government cost plus contractors in the vicinity for labor. The decision was based on "*assumption of risk*" by the contractor (59 Fed. Supp. at 409). The "8 hour day" clause had been deleted from the plaintiffs' contract on account of the war emergency, thus expressly recognizing the effect of the National Defense and Appropriation Acts under which the cost plus work was being performed. The plaintiff voluntarily signed his contract with knowledge of the deletion. The terms of the contract in question in the *Standard Accident* case are markedly different from those of the Rosenberg contracts, particularly when the representations of the Secretary of Agriculture are considered. The doctrine of assumption of risk has no application here.

The *Froemming* case (Ct. Cl.) 70 Fed. Supp. 126 (App. Op. Br. p. 28) involved more than diversion of war materials to a higher priority destination to further the nation's war program. The court in that case also held the United States was liable to reimburse the contractor for the cost of unnecessary transportation of machinery to the Canal Zone on government order, and for delays occasioned by a government order prohibiting the transportation of gasoline through the work area. The court's ruling that the United States was not liable for delays occasioned by diversion of equipment to higher priority uses for prosecution of

the war (a sovereign function) has no application to the *contractual* procurement activities of CCC in the instant case. Furthermore, the government had made no representation in the *Froemming* case which remotely resembled the Secretary's September 5 announcement.

II. CCC Breached Its Implied Contract Not To Obstruct Rosenberg's Performance or Render It More Expensive.

A. A CONTRACT NOT TO PREVENT OR HINDER PERFORMANCE BY THE OTHER PARTY TO AN EXECUTORY CONTRACT WILL ALMOST ALWAYS BE IMPLIED.

Generally, and in most situations, a contract not to hinder performance or render performance by the other party to a contract more expensive will be implied from the mere fact that a contract calling for performance by the other party has been executed. The absence of such an implied contract depends upon *exceptional* circumstances. Thus, Corbin in his treatise on Contracts states:

"In any kind of contract, if the right of one party to compensation is conditioned upon the rendition of some service or other performance by him or on his behalf, it is *nearly always* a breach of contract for the other party to act so as to prevent or hinder and delay or to make more expensive the performance of the condition. It is a breach of duty only because the court finds a promise by implication not to prevent or hinder." 3 Corbin on *Contracts* (1951 Ed.) § 571. (Emphasis added) See also 4 *Ibid* § 947.

The authorities which Appellant cites (App. Op. Br. p. 33 *et seq.*) do not alter the fact that such a promise will *generally* be implied. They relate only to the scope of that promise. Appellant's argument that the implied promise is not broken by a contractor's purchases in competition with a supplier under contract to furnish him a product is based on assumption of that risk by the supplier. When the risk is not assumed, there is an actionable breach of the

implied contract. Thus, *Restatement of Contracts*, § 315, recognizes that such conduct may constitute a breach if "not within the risk assumed." Williston, *Contracts* (Rev. Ed.), § 1293A (App. Op. Br. p. 33), like Corbin, regards non-liability as an "exception" to the general principle, and states that the exception must be made "where the hindrance is due to some action of the promisor which *under the terms of the contract* or customs of the business he was *permitted* to take." Where the risk is "not naturally and properly to be anticipated," hindrance is a breach of the implied contract.

This statement of the law is supported by the cases. *Patterson v. Meyerhofer* (1912), 97 N.E. 472, 204 N.Y. 96 gave one contracting party affirmative relief against the other party to an executory contract for the purchase of four houses. In that case defendant purchaser knew that the plaintiff did not own the houses which plaintiff was contracting to sell, but intended to purchase them at a foreclosure sale. Defendant repudiated his contract and outbid plaintiff at the foreclosure sale, securing the houses for less than the contract price.* The court allowed plaintiff his loss of profit on the theory that defendant had breached his implied covenant not to prevent plaintiff's performance, stating:

"In the case of *every* contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other from carrying out the agreement on his part."

See also

Orton v. Embassy Realty Associates (1949), 91 C.A. 2d 434, 438; 205 P.2d 427;

Tanner v. Title Insurance & Trust Co. (1942), 20 C.2d 814, 825; 129 P.2d 383.

*Note the striking similarity to CCC's conduct in competing with Rosenberg by soliciting and accepting bids from growers after the changes in its program were announced in October, 1947.

The cases which Appellant cites at the top of page 39 of its Opening Brief are not in point since none of them involve an implied contract not to hinder or prevent performance. Each of these cases deals with a radically different type of implied promise, not present in "almost every" contract, which a court must imply from particular facts. In *Cherrywood Apartments v. U. S.* (Ct. Cl.), 98 Fed. Supp. 577, plaintiff was unable to show any contract whatsoever with the United States. *Columbia Railway & Power Co. v. City of Columbus* (1918), 249 U.S. 399, *Lloyd v. Murphy*, (Cal.) 153 Pac. 47, and other cases cited by Appellant on pages 39-41 of its Opening Brief are cases between private litigants to which the United States is not even a party. The interference with performance in each case is not interference by the other contracting party, but the effect of sovereign action by the United States *which was not a party to the agreement in suit*. Such cases have no application here.

Appellant attempts to distinguish *U.S. v. Peck* (1880), 102 U.S. 65 (App. Op. Br. p. 41), one of the leading cases establishing the existence of an implied promise not to hinder or prevent performance or to render performance more difficult or expensive, on three grounds: (1) presence of an express agreement, (2) total prevention and (3) the fact that no affirmative relief was sought. These distinctions are not valid and do not avoid the controlling logic of this case.

The facts of the *Peck* case stated by Appellant, and as they appear in the reports, disclose no "express agreement" that Peck was to cut hay for the Tongue River garrison at Big Meadows. The procurement contract contained no reference to the source from which the hay was to be furnished. The court, however, allowed parol evidence of the circumstances surrounding the transaction. There was, at most, a "mutual understanding" between the Chief Quartermaster and the contractor that the hay was to be cut in Big Meadows. Secretary Anderson's September 5 announce-

ment and repeated insistence by CCC officials that the program "as announced" would not be changed make the instant case even a stronger one for implication of a contract not to render performance more difficult or expensive than the *Peck* case.

Total prevention was not the ground on which the court in the *Peck* case based its decision. It is difficult to believe that no hay at all was obtainable. It could have been hauled from a distance at greater expense. But, even assuming that total prevention was shown in the *Peck* case, the implied contract cannot be so narrowly construed. Cases finding breach of the implied contract do not distinguish between total prevention and conduct rendering performance more difficult or expensive. Thus, in *George A. Fuller Co. v. U.S.* (Ct. Cl. 1947), 69 Fed. Supp. 409, a contractor was allowed to recover damages from the United States on account of delay occasioned when the government failed to furnish models for the contractor to follow. The contract contained no express provisions allowing damages for such a delay but the court allowed recovery on the ground that:

"It is, however, an implied provision of every contract, whether it be one between individuals or between an individual and the Government, that neither party to the contract will do anything to prevent performance thereof by the other party *or that will hinder or delay him in its performance.*" (*Id.* at 411. Emphasis added.)

In *Sunswick Corp. v. U.S.* (Ct. Cl. 1948) 75 Fed. Supp. 221, *cert. den.* (1948) 334 U.S. 827, 92 L.Ed. 1755, a lump sum contractor with the United States was allowed to recover extra labor costs. The contract specifications prepared by the United States fixed a wage rate for carpenters of \$1.25 per hour. The Federal Wage Readjustment Board reclassified the contractor's carpenters into a higher paid category. The court allowed the contractor to recover the wage difference from the United States. The contract

contained a clause allowing price adjustments for higher wages, but the court stated that even in the absence of such a provision

“* * * the Government could not in its capacity as a contracting party, compel the contractor to pay wages in excess of the specified minimum rate without subjecting itself to liability for breach of the implied condition that *neither party would increase the other party's cost of performance.*” (*Id.* at 230. Emphasis added.)

The fact that no affirmative relief was sought in the *Peck* case* does not limit to that situation the applicability of the principle on which the decision is based. The implied contract not to hinder or prevent performance is available both as a defense and as a ground for *attack* in contract actions.

4 Corbin on *Contracts* (1951 Ed.) 814;

Patterson v. Meyerhofer (1912) 97 N.E. 472, 204 N.Y. 96;

Sunswick Corp. v. U.S. (Ct. Cl. 1948) 75 Fed. Supp. 221, *cert. den.* (1948) 334 U.S. 827, 92 L.Ed. 1755;

George A. Fuller Co. v. U.S. (Ct. Cl. 1947) 69 Fed. Supp. 409.

B. THE REPRESENTATIONS MADE IN THE SEPTEMBER 5 ANNOUNCEMENT AND SUBSEQUENT CONDUCT OF CCC OFFICIALS PRECLUDE THE CHARGE THAT ROSENBERG "ASSUMED THE RISK" OF A CHANGE IN CCC'S 1947 RAISIN PURCHASE PROGRAM.

Whether or not Rosenberg "assumed the risk" of the changes in CCC's 1947 raisin purchase program is a question of fact. The District Court found that Rosenberg did not assume that risk (R. 58; Finding 44). There is ample evidence in the record to support

*Plaintiff was suing to recover payment on a contract to supply wood, which had been performed; the United States attempted to offset its damages for plaintiff's failure to deliver hay against the price due for wood, and the court held that the action of the United States which interfered with plaintiff's performance of its contract to deliver hay excused performance under that contract.

that finding and it should not be disturbed by an appellate court.

The September 5 announcement itself removed all possibility that Rosenberg should assume the risk of change in the program. Its words were definite and unequivocal. The announcement stated that CCC "will" purchase up to 133,000 tons of dried fruit; that the "*maximum limit* * * * is" divided into certain enumerated amounts of each type of dried fruit (61,000 tons of which are raisins); that purchases under the program "will" be made from processors and packers; that an announcement "will" be issued soon inviting packers to make offers on a portion of the quantity "to be purchased"; that raisin purchases "will" be confined to the Thompson seedless variety; that the program "does not provide price support at any given level". The Department could have used words of equivocation such as "may" or "might" but it did not. That it realized the difference is apparent from its use of the word "expect" in the announcement when referring to probable results.* Secretary Anderson even expressly invited the dried fruit industry "to complete its plans for readjustment" on the basis of the program announced.

CCC's raisin purchase program was based on approximately the same surplus estimate as the industry had prepared (Pl. Ex. 3).† Whether or not this figure was accurate, it was the best obtainable, it was prepared by qualified persons, and it was the basis on which the CCC raisin purchase program was planned. The program was to take only 61,000 tons, leaving a *known* surplus of

*Appellant states (Op. Br. p. 47) that the "announced *objective* of the program was to achieve prices which would be fair both to producers and consumers." The language of the announcement does *not* state the *objective* of the program, but rather refers to its probable *results*. CCC's "plan" to establish a price of \$125—\$135 per ton (App. Op. Br. p. 48) was a secret plan uncommunicated to anyone outside the Department. The September 5 announcement does not indicate such a plan. It outlined a supply program and stated that prices would not be maintained "at any given level."

†In fact, CCC's estimate in the economic data supporting Docket OC-95a was slightly in excess of the industry estimate (Pl. Ex. 5).

40,000 tons overhanging the market. It provided for purchases from *packers* and not from *growers*. It was *not* to support prices at any given level. These terms were released to the press and circulated by mail to Rosenberg. Two announcements calling for bids on a portion of the quantity covered by the September 5 announcement followed. The two calls for raisins totalled 61,000 tons, exactly the amount specified in the September 5 announcement as the maximum purchase. The CCC Board even told Senator Downey that low bids had been obtained from packers on the basis of these "representations" as to CCC's maximum purchases (R. 143).

If flexibility was so essential, CCC could easily have used "words of hope and expectation," and could have indicated the tentative nature of its program. It did not. Instead, it summarily rejected all requests for change. When Rosenberg suggested another procedure which Grady felt would provide "prices satisfactory to producers and the Department" (Pl. Ex. 6), Smith replied (Pl. Ex. 8) that the suggested changes were "contrary to the Secretary's statement" and that the "program as announced" was a "substantial contribution towards stabilized conditions within the Dried Fruit Industry." His concluding words added a ring of finality to his other statements: "We solicit and expect receive cooperation Rosenberg and other packers in making it a success." Grady's conversations with other Department and CCC officials were of similar general purport (R. 173-177).

Appellant argues that the doctrine of "assumption of risk" precludes the implication of a contract not to hinder Rosenberg's performance "unless we find some representation by CCC that there would be no change of program" (App. Op. Br. p. 49). In the light of the facts, this "argument" becomes a *concession* that the implied contract does exist in this case.*

*Indeed at one point in the trial, counsel for CCC, in answer to questions from the court, expressly conceded:

(1) That it was *not* "within the contemplation of the parties" that

C. THE SEPTEMBER 5 ANNOUNCEMENT WAS RELIED UPON BY ROSENBERG, AND CCC INTENDED IT TO BE RELIED UPON.

Whether the September 5 announcement was issued with contractual intent is immaterial for the purposes of this case. As has already been pointed out, CCC is liable on its implied promise not to hinder Rosenberg's performance whether or not the September 5 announcement was an enforceable promise of CCC. The mere existence of the announcement and its communication to Rosenberg suffice to support the holding of the trial court that Rosenberg did not "assume the risk" of change in the program.

Nevertheless, some of Appellant's comments about the September 5 announcement cannot pass unchallenged (See App. Op. Br. p. 50). Counsel loosely declare that the press release was not intended by Appellant as a contractual commitment, citing pp. 458-459 and 471 of the Record. Counsel might have more accurately stated that it was *Secretary Anderson's uncommunicated intention* that the September 5 release was not contractual. Secretary Anderson even attempted to explain the 61,000 ton maximum limitation on raisin purchases as a "control on the officials of Commodity Credit Corporation" (R. 365). Announcement to the press and circulation to the dried fruit industry is indeed a novel manner of imposing a contractual limitation on administrative officials of CCC! The true purpose of the September 5 announcement appears in the Docket and in the next to last sentence of the announcement itself ("to enable the dried fruit industry to complete its plans for readjustment on a self-help basis"). It was obviously intended that Rosenberg and other packers should rely on this announcement of the whole program in making their bids in response to it and to

CCC would enter into purchase contracts with growers (R. 394), and

(2) That the \$135 certification requirement was *not* "within the contemplation of the parties" at the time Rosenberg and CCC entered into the contracts in question (R. 392).

S. R. Smith also testified that the 1947 raisin purchase program "as announced" on September 5, 1947, did not provide for support of raisin prices "at any fixed level" (R. 481).

the calls for "portions of the quantity to be purchased," contemplated by it, i.e., Announcements No. 1 and No. 2 (Pl. Ex. 9, 14). The court so found (Findings 13, 18, 19; Testimony: R. 167-169, 170-171, 178-195, 217, 370, 375-376, 383-384, 508-510).

Rosenberg's view of the September 5 announcement is also misrepresented in Appellant's Brief. Appellant makes a great "ado" about Dwight Grady's testimony that the September 5 release was not a basis on which the *vendor* (Rosenberg) makes any commitment (App. Op. Br. p. 50). Grady testified only that the release "itself" was not a basis on which a vendor made its commitment. But in this case the September 5 press release was followed by the mailing to members of the industry, including Rosenberg, of a copy of the text of the release, and of invitations to bid on portions of the quantity covered; and Rosenberg and other packers then made offers to sell raisins to CCC. In making its bids, Rosenberg did rely on the September 5 announcement as the basis for determining whether or not to sell (R. 315-316, 383-384; Findings 13, 18, 19). Grady also testified that while Rosenberg did not rely upon a newspaper story of the contents of the Secretary's September 5 announcement in making its bids, it did rely upon the copy of the announcement which it received in the mail and upon statements of government officials that Rosenberg was expected to cooperate in *the* program thus announced (R. 369-379, 383-384).*

The attempts of Grady and other interested parties to secure a change in the program after the September 5 announcement do not mean that they believed the announcement was only a tentative plan. As Grady declared, Rosenberg did not regard the release *itself* as a binding contract. It became *binding* when followed by

*Smith's rejection of Grady's Webb-Pomerene proposal (Pl. Ex. 8) refers to the Secretary's September 5 statement as a standard, and then "solicits and expects" the cooperation of Rosenberg and other packers in "*the* program as *announced*." The last phrase can refer only to the Secretary's announcement of the program on September 5.

a formal offer and acceptance based upon its terms. At the time Grady and others sought modification of the program, neither of Rosenberg's bids had been accepted by CCC. There was *no* contractual commitment at all until Rosenberg's first bid was accepted. *After acceptance*, CCC could not without liability hinder Rosenberg's performance of its executory contract. But even after a contract is made, there is nothing to prevent a party from asking for modification. The point here is that CCC flatly refused to make any changes.

Kluge's conversations with Smith (App. Op. Br. p. 50) have no relevance to Rosenberg's reliance on the September 5 announcement of the raisin program. Kluge discussed the *prune* program with Smith (Pl. Ex. 6). He was in the prune business and not in the raisin business (R. 646). Counsel's statement that Kluge "presumably" relayed Smith's alleged words (that Smith was in no position to tell him whether CCC would buy more than the maximum quantities stated in the September 5th release) to Grady is completely unsupported by the record (R. 498-499). Grady flatly denied that Kluge had told him any such thing (R. 646). At the trial, when counsel attempted to raise the same inference on the basis of Grady's reference, in his September 9 telegram to Smith (Pl. Ex. 6), to a discussion with Kluge of his conversation with Smith, the court commented that counsel's implication was "pure inference and speculation" (R. 499).

Counsel continues to "speculate" on even flimsier grounds (App. Op. Br. p. 52) that Grady did not rely on the September 5 announcement after receiving Smith's telegram (Pl. Ex. 8). Grady's "recognition of the hazard of selling short" is a far cry from assuming the hazard that CCC would change its raisin purchase program. There are indeed *market* hazards in a short sale. The hazards which Rosenberg "assumed" in taking a short position when it bid on the CCC contracts were these usual hazards of supply and demand and no others. The "assumption of risk

doctrine" has never been applied to the risk that one contracting party will act contrary to its expressed representations on which the other party bases its offer.

Counsel misquotes Grady as stating, "If the growers were successful in securing a change we might be required to pay \$150 a ton for raisins". Grady's words were "if the growers *had been* successful * * *" (R. 205). He was not talking as of 1947, but in retrospect at the date of the trial, immediately after stating Rosenberg's expectation in 1947 that "Setrakian could not change the laws of supply and demand" and that Rosenberg was convinced the program would *not* be changed (R. 204-205).

Grady's memorandum re Corbaley's statements (Def. Ex. B) relates to the *price level* at which CCC would purchase under the program as announced. The loose phrase "what Washington may do is always a gamble" is meaningless unless read in context. Moreover, Grady passes on Corbaley's opinion "for what it is worth." The language which Appellant emphasizes in Grady's letter to Cooper (Def. Ex. AH) is also rather meaningless general language. This evidence, typical of that on which Appellant relies, clearly illustrates the weakness of its position, as indeed does its reference to exhibits which are not in evidence.*

Appellant's counsel continuously make charges that Rosenberg bid "below the market" and "took a gamble" when it bid on the CCC calls for raisins. Neither of these statements is true. In the early part of the season when CCC called for bids, there was little trading except for early delivery at premium prices, and there was no established market. What better evidence of *market level* could there be than the Sun Maid bid on 20,000 tons, only slightly higher than Rosenberg's bid under Announcement No. 1 and

*In the footnote on page 52 of Appellant's Opening Brief reference is made to the contents of Defendant's Ex. P and Q as if they were in evidence. Lest the court be misled, these exhibits *were not admitted*. Even if they were in evidence, the newspaper stories were reports of *rumors* of *unsuccessful* efforts to effect a change, and came *after* Rosenberg's first bid was accepted and *after* its second bid was submitted to CCC.

slightly lower than Rosenberg's bid under Announcement No. 2? Rosenberg did not bid in response to CCC's calls in order to "take a gamble" or to "make a killing" or in the hope of a "great profit." Such charges are ridiculous. Grady testified that it was very unusual for Rosenberg to go short to the extent that it did in bidding on CCC's 1947 raisin program; that Rosenberg had never engaged in wide speculation of the sort required by the CCC bids; that at the time bids were called for by CCC, no supply market had been established, raisins were not yet in existence or ready for delivery; that growers normally will not sell before they know what their raisin crops are, even ignoring other conditions which contributed to their reluctance to sell in 1947; and that the short position which was forced upon Rosenberg was one of its objections to the program (R. 384-385). Grady also stated that as a large factor in the industry, it was necessary for Rosenberg to participate in the CCC program if the surplus situation was to be alleviated; that Rosenberg officials felt that the Department was relying on them to participate, and that it was important to commercial handlers to see the surplus removed so that there would be price stability for the balance of the crop. Rosenberg's cooperation was "solicited and expected" by the Department (Pl. Ex. 8). Rosenberg decided to bid after it had given up hope that the program would be changed (R. 199). With the realization that even Setrakian (head of the grower organization) could not change the laws of supply and demand, with knowledge of the 100,000 ton surplus, and in the belief that the CCC program would not be changed, Rosenberg decided it would be able to cover its bids to CCC without suffering a loss (R. 204-205). In making its bid, Rosenberg calculated what its competitors would bid and made its own bid at a price which it felt had a chance of getting the business (R. 199). In the opinion of Grady and his associates, Rosenberg surely would have been able to cover its CCC bids at \$110 per ton or less under the program as announced (R. 217-218).

Appellant's speculation over what Rosenberg "might" have done instead of bidding as it did (App. Op. Br. p. 55) is completely unrealistic. If Rosenberg and other packers had refused to bid, the whole 1947 purchase program would have failed. A similar result would have followed if Rosenberg and other packers had bid only on raisins which they had obtained from growers at a fixed price. If Rosenberg had based its bid on the price growers were asking, other packers would have had the business, or if all packers had based their bids on the price growers were asking, it is probable that CCC would have rejected all bids.* Rosenberg's decision was made on the basis of the facts known at the time its bids were made. These included the September 5 announcement. CCC is liable for damage to Rosenberg caused by its action inconsistent with that announcement.

Counsel for Appellant also suggests a pragmatic test for determining the existence of an implied contract on the part of CCC, and declares that it is "inconceivable" that CCC would knowingly have agreed to compensate the packers for any loss resulting from a change in its program (App. Op. Br. p. 54). If such a possibility is so "inconceivable," why did S. R. Smith, head of the branch of PMA in charge of the raisin purchase program, recommend renegotiation of packer contracts (Pl. Ex. 50) ?

D. THE LEGAL AUTHORITIES CITED BY APPELLANT DO NOT RELIEVE IT OF LIABILITY FOR THE CHANGES IN ITS PROGRAM.

Harlingen Canning Co. v. CCC, 93 Fed. Supp. 45, *aff'd* 193 F.2d 176 (App. Op. Br. p. 50), has no bearing on the nature of the September 5 announcement because it did not involve a *change* of program. It was concerned with the validity of an interpretation by CCC of a subsidy regulation. The only news release involved expressly precluded subsidies on products exempt

*CCC did reject all grower offerings on November 26, 1947 (Pl. Ex. No. 24).

from price control, and thus was *consistent* with CCC's denial of a subsidy on the ground that there had been no sale eligible for subsidy until after price control had lapsed. The plaintiff in the case failed to adduce proof which would bring it within a contractual exception to the regulation.

In the *Shedd-Bartush Foods* case (D. Ill. 1955), 135 Fed. Supp. 78 (App. Op. Br. p. 55) the rise in the price of tallow which the plaintiff had contracted to sell to CCC did not result from any action of CCC, but rather from the end of price control, an event which both parties had anticipated. The court had before it a letter from plaintiff written to CCC complaining of losses under another contract because of purchases during a decontrol period. The letter was written at the time the contract in question was made and evidenced the plaintiff's knowledge and assumption of the risk of decontrol. In the present case the action which caused Rosenberg's loss was that of CCC itself; and CCC had in the September 5 announcement expressly represented that it would not take the action complained of.*

Both *Cherrywood Apts. Inc. v. U.S.* (Ct. Cl. 1951), 98 Fed. Supp. 577 and *R.F.C. v. MacArthur Mining Co.* (C.A. 8, 1950) 184 F.2d 913, *cert. den.* 340 U.S. 943, *rehg. den.* 341 U.S. 917 (App. Op. Br. pp. 56-57) are distinguishable because in neither of those cases did the plaintiff have a *contract* with the United States. In the *Cherrywood* case, a builder attempted to create a contract out of his reliance on a declaration of legislative policy expeditiously to remove public housing which competed with private housing which the builder had constructed in reliance on the declaration of policy. In the *MacArthur Mining* case the

*It is interesting that the court in the *Shedd-Bartush* case assumed without passing on the issue that a CCC announcement of contemplated purchases of oleomargarine, including a statement that CCC would arrange a source of coconut oil at ceiling prices if the successful bidder could not secure coconut oil through usual channels, was a part of the purchase contract.

plaintiff attempted to "manufacture" a contract out of its continued operation in reliance on a Presidential letter to a United States Senator declaring a "national policy" that prices paid in the raw metals and minerals program would assure a fair rate of return. Plaintiff had no formal contract with a federal agency. The court, in the language quoted on page 58 of Appellant's Brief, recognized this defect when it stated that a government policy "does not give rise to a contract *in and of itself*" (emphasis added). Moreover, in the *MacArthur* case, the plaintiff alleged that the Presidential letter had the "force and effect of law," and presented its case on the basis that it resembled a *statute* (which of course, can be amended in the absence of contractual rights). An additional distinction is the fact that plaintiff's operations had commenced *prior* to the date of the letter so that plaintiff could not claim action in reliance.

The exclusive franchise cases which Appellant cites (App. Op. Br. pp. 58-60) are merely examples of a special doctrine that the agreement of a governmental body not to grant a similar franchise to "other persons" does not give rise to any implication that the governmental body, itself, will not compete with the exclusive franchiseholder. The doctrine goes no further. Its limitations are exemplified by *The Binghamton Bridge* (1865), 70 U.S. (3 Wall.) 51, 18 L.Ed. 137 where the court held that a state legislative act authorizing construction of a bridge and making it unlawful to erect another bridge within two miles precluded the *legislature* from authorizing another person to construct such a competing bridge after the original bridge had been constructed in reliance on the statute.

Appellant's statement of *U.S. v. Binghamton Construction Co.*, 347 U.S. 171 (App. Op. Br. p. 60) is misleading. The basis of the decision in that case was not the non-contractual nature of the wage schedule prepared by the government. The court assumed it was contractual in nature but found it was a *minimum* wage

schedule, and that the contractor, by the very terms of the contract, might be required to pay *more*. In the case before this court, CCC announced a *maximum* purchase.

E. WHILE DETERMINATION OF THE CONTRACTUAL NATURE OF THE SEPTEMBER 5 ANNOUNCEMENT IS NOT ESSENTIAL TO THE DECISION OF THE DISTRICT COURT, IT ACTUALLY WAS A CONTRACTUAL COMMITMENT BINDING UPON CCC.

The decision of the District Court did not turn upon the contractual nature of the September 5 announcement. It was based on CCC's implied contract not to hinder or render Rosenberg's performance more expensive, so that the September 5 announcement was pertinent only insofar as it related to the risks assumed by Rosenberg. A close examination of the record does, however, demonstrate that the September 5 announcement was an integral part of Rosenberg's raisin contracts with CCC.

1. Documents Which Alone Do Not Give Rise to Contract Rights May, Nevertheless, Become Part of a Contract When Followed by a Formal Offer and Acceptance Which Does Create a Contractual Relationship.

The contracts here in question are not single documents contained within the four corners of one sheet of paper. Contract 1647 consisted of:

- (1) The September 5 announcement (Pl. Ex. 4).
- (2) Announcement No. 1 (Pl. Ex. 9) calling for bids on 30,000 tons of the 61,000 tons covered by the September 5 announcement.
- (3) Completed mimeographed bid form filed by Rosenberg with CCC (Pl. Ex. 10).
- (4) PMA 100—a printed sheet of standard contract conditions (Pl. Ex. 10).
- (5) CCC's telegraphic acceptance of Rosenberg's bid conditioned upon an extension (Pl. Ex. 11).
- (6) Rosenberg's consent to the extension (Pl. Ex. 12).

Contract 1893 consisted of:

- (1) The September 5 announcement.
- (2) Announcement No. 2 (Pl. Ex. 14) calling for bids on the balance of the 61,000 tons covered by the September 5 announcement.
- (3) Completed mimeographed bid form filed by Rosenberg with CCC (Pl. Ex. 15).
- (4) PMA 100.
- (5) CCC's telegraphic acceptance of part of Rosenberg's bid (Pl. Ex. 16).

When there has been a final and formal assent of the parties to a "piecemeal contract" such as this, the terms of the contract may be found in earlier documents, letters, etc., even though not restated in the final acceptance.

1 Corbin on Contracts (1950 Ed.) §§ 22, 31;

Ottney v. Finnie (1935) 5 C.A. 2d 356, 42 P.2d 714
(printed prospectus of golf club regarded as part of contract);

Mayers v. Loews, Inc., (1950) 35 C.2d 822, 221 P.2d 26
(letter and employer bulletin regarded as part of collective bargaining agreement).

2. The Several Steps in the Origination and Consummation of a Transaction Must Be Considered as a Whole and Read Together to Determine the Intention of the Parties and the Terms of Their Agreement. It Is Not Necessary That They Refer to Each Other.

The mimeographed bid forms (Pl. Ex. 10, 15) which Appellant chooses to call "the contracts" (App. Op. Br. p. 46) certainly did not contain the entire contract of the parties, but were merely the formal *offer* by Rosenberg which culminated the series of communications making up "the contract" when *accepted* by CCC. All of the instruments passing between the parties must be examined to find the terms of the agreement.

"It is well-settled law that several writings executed between the same parties substantially at the same time and relating to the same subject matter may be read together as forming parts of one transaction, nor is it necessary that the instruments should in terms refer to each other if in point of fact they are parts of a single transaction." *Bailey v. Railroad Co.* (1872) 84 U.S. (17 Wall.) 96, 108, 121 L.Ed. 611, 613.

See also:

Doherty Research Co. v. Vickers Petroleum Co. (C.C.A. 10, 1936) 80 F.2d 809, *cert. den.* (1936) 299 U.S. 545, 81 L.Ed. 401;

Layne-Bowler Chicago Co. v. Glenwood (C.C.A. 8, 1929) 34 F.2d 889;

Williston, *Contracts* (1937 Ed.) § 628;

12 *Am. Jur.*, *Contracts* § 246;

17 *C.J.S.* 714.

The absence of any reference to the September 5 announcement in the mimeographed bid forms (Pl. Ex. 10, 15) filed by Rosenberg with CCC is without significance. These forms were prepared by CCC and merely filled in by Rosenberg. There was no space on the form in which Rosenberg could state on what it relied in making its bid. Moreover, the September 5 announcement was made on behalf of CCC, and it would be novel indeed to require Rosenberg to reiterate the undertakings of the *other* party to its contract.

3. Contemporary Statements by Officials of the Department of Agriculture Also Demonstrate That the September 5 Announcement Was a Part of the Whole Contract.

A copy of the September 5 announcement was sent by mail to Rosenberg. The September 5 announcement was carefully edited before its release. It was the *only* announcement of the general plan of the *whole* raisin purchase program. It was the "immediate"

announcement of the program contemplated by the Docket. Announcements No. 1 and No. 2 were only *parts* of the program. The Docket was formally amended (Pl. Ex. 5; Def. Ex. M) to provide for raisin purchases in excess of 61,000 tons although the 61,000 ton figure appeared no place in the Docket itself, and *only* appeared in the September 5 announcement. S. R. Smith described the September 5 release as the announcement of "the general plan" of the "dried fruit purchase program * * * the terms and conditions of which were *more* specifically announced in Announcements No. 1 and No. 2" (Def. Ex. I), and then testified that he stood responsible for the language and had the assistance of the Solicitor's office in preparing the letter in which it was contained (R. 508-509). Announcements No. 1 and No. 2 were undoubtedly the calls for bids on a "portion of the quantity to be purchased" referred to in the September 5 announcement (Pl. Ex. 4). The sum of the tonnage called for by both announcements was exactly the 61,000 tons specified in the September 5 announcement. After bids were accepted, the Department of Agriculture recognized the character of the September 5 announcement by stating that purchases had been made "under the program announced by the Department September 5, 1947" (Pl. Ex. 13), and by summarizing the total purchases of dried fruit "since offers to purchase were originally announced by the Department on September 5" (Pl. Ex. 19).

III. Rosenberg Did Not Waive Its Rights to Recover Damages from Appellant.

Appellant makes two points with respect to waiver:

- (1) Rosenberg's performance after knowledge of CCC's breach amounted to waiver of its claim for loss suffered in the course of such performance.
- (2) Rosenberg's invitation to an amendment and performance of the amended contract, with knowledge that CCC understood the contract to be fully binding, waived the breach.

Neither point is well taken. The first is based on an erroneous statement of the law, as well as upon an unsupported view of the facts, and the second proceeds on an unwarranted factual assumption.

A. ROSENBERG DID NOT WAIVE ITS RIGHT TO CLAIM DAMAGE BY PERFORMANCE AFTER KNOWLEDGE OF CCC'S BREACH.

1. The Facts Are Misrepresented by Appellant.

Although Rosenberg's conduct *prior* to October 14, 1947, has no material bearing on waiver by performance, Appellee, nevertheless, believes it should correct certain comments with respect to such conduct contained in Appellant's Brief (App. Op. Br. p. 62). Appellee challenges statements that Rosenberg bought raisins only for its commercial customers prior to mid-December, 1947. This is one of the bases of the cross-appeal in this case and will be more fully discussed in the section on damages, *infra*. Suffice it to say, at this point, that Rosenberg, both before and after October 14, bought all the raisins it could buy and closed purchase contracts at the best price level it could in order to fulfill its CCC contracts, and that by the end of January, 1948, it had the raisins "for" its CCC commitment. That Rosenberg regarded the CCC contracts as firm "sales" at or about the time they were made is evidenced by the two sales tags covering its CCC contracts (Def. Ex. C), and, even more forcefully, by Rosenberg's acquisition of raisins in quantities far exceeding its commercial sales as fast as it could acquire them after the CCC contracts were made.

2. The Law Is Misstated by Appellant.

Appellant contends that by acquisition of raisins to cover its CCC commitments and performance after CCC's breach Rosenberg waived its right to damages. As has already been indicated, Rosenberg acquired at least some raisins for the CCC contracts *before* the breaches occurred. But even assuming for purposes of argument that all acquisitions followed the breaches of contract, Rosenberg's performance did not waive its rights.

The controlling legal principle is stated in *Bu-Vi-Bar Petroleum Corp. v. Krow* (C.C.A. 10, 1930), 40 F.2d 488, 490, a suit to recover damages for breach of contract to drill an oil and gas well. The court found that the plaintiff had made its election to treat the contract as broken, but in discussing plaintiff's rights observed:

"When defendant repudiated the contract, plaintiff had an election of remedies as follows: (a) to rescind the contract and recover the value of any performance rendered. (b) To treat the repudiation as an immediate breach and sue at once for any damages which plaintiff has sustained. (c) To treat the contract as binding and wait until the time for its performance and thereafter bring an action on the contract for its breach".

The same legal principle has been voiced in 2 *Fed. Law of Contracts* § 429 where the statement appears:

"Where there is a breach of contract by one party thereof, the party not in default may stop and refuse any further performance, and claim full damages for the breach. He is not required to do so, but may continue to perform insofar as he is permitted and then claim damages for the breach."

See also:

5 *Corbin on Contracts* (1951 Ed.) § 1105 p. 469;

Winans v. Sierra Lumber Co. (1884) 66 Cal. 61, 4 Pac. 952 (recognizing right of one party "to continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained" after a *partial* breach of contract by the other party).

CCC's breach of contract gave Rosenberg an election to rescind or perform and claim the damages resulting from the breach. Until January, 1948, Rosenberg sought renegotiation of price or cancellation. Meanwhile it was acquiring raisins. When its efforts for administrative adjustment failed, it decided to deliver and claim its damages. It had every legal right to do this.

Although Appellant denies this right, none of the cases which it cites are in point. This is a breach of contract case. It is not a fraud case, and it is not a case of repudiation by CCC. CCC in fact continuously insisted on Rosenberg's performance. Under these circumstances Rosenberg was not bound to avoid losses by rescission. It retained its right to elect to perform.

The *Bu-Vi-Bar* case, *supra*, 40 F.2d at 492 contains language which illustrates the difference between the instant case and repudiation cases:

"The situation of the injured party, where there has been a breach which does not indicate an intention to repudiate the remainder of the contract, and the situation of the injured party where there has been a total renunciation of the contract, differs in important particulars. In the former case, the injured party has a genuine election either of continuing performance or ceasing to perform * * * Any act, indicating an intent to continue, will operate as a conclusive election * * * On the other hand, where the contract is wholly renounced, there can be no real election between continuation and cessation of performance * * *, because, after notice of renunciation, the other party cannot go on and complete an executory contract and sue for any increased damages resulting from his continuing to perform".

See also

Williston, *Contracts* (Rev. Ed.) § 1298.

The legal authorities cited by Appellant (App. Op. Br. p. 63) are all clearly distinguishable. Thus, neither *Monad Engineering Co. v. U.S.*, 53 Ct. Cl. 179 nor *Bd. of Trustees v. O. D. Wilson Co.* (D.C.A.) 133 F.2d 399, involves breach of contract. The former concerned a contractor who performed without protest after discovering a *changed soil condition*, and the latter, a contractor who performed after discovering *his own mistake* in bidding. In *Dubois Construction Co. v. U.S.* (Ct. Cl.) 98 F.S. 590, the court found that the plaintiff had *not* relied upon a representation (made *after*

his bid was submitted) as to the starting date of a job; moreover, his performance *without protest* after defendant's delay in the issuance of a proceed notice was a waiver of the delay; and there was *no breach of contract*, in any event, because the contract language was consistent with the defendant's delay. Both *B. & O. Railway v. Jolly Bros. & Co.* (Ohio) 72 N.E. 888 and *Simon v. Goodyear Metallic Rubber Shoe Co.* (C.A. 6) 105 Fed. 573 dealt with waiver of damages for *fraud* rather than breach of contract. In addition, the contract in the *Jolly Bros.* case precluded parol modification, so that an oral promise to pay additional compensation was unenforceable. In *H. E. Crook Co. v. U.S.* 59 Ct. Cl. 593, the waiver consisted of performance *without claim or protest* after delay caused by the other party.

B. ROSENBERG DID NOT WAIVE ITS RIGHT TO CLAIM DAMAGES BY INVITING AN AMENDMENT AND AGREEING TO PERFORM AT THE CONTRACT PRICE.

1. The Facts on Which Appellant's Argument Is Premised Are Not Supported by the Record.

After being informed by CCC that it was under an obligation to deliver (Pl. Ex. 29), Rosenberg, by letter dated January 22, 1948 (Pl. Ex. 30), requested an amendment extending the delivery date and reinstating its tonnage under Contract 1647. On January 26, 1948, CCC sent a telegram (Pl. Ex. 32) which went not only to Rosenberg but to all packers who had CCC raisin contracts. This telegram dealt only with *shipment* and *delivery* of raisins under the CCC contracts and a *waiver of carrying charges*.* Only one

*On October 10 and 16, 1947, CCC had issued Notices to Deliver (Def. Ex. V) under Contract 1647. After October 16, CCC used informal letters in lieu of Notices to Deliver (Def. Ex. W). CCC did not issue either letters or Notices to Deliver under Contract 1893 during the original delivery period. No notices were issued under Contract 1893 until shipment was ordered after January 30, 1948 (Def. Ex. X). The Office of the Solicitor was concerned that CCC might be liable for carrying charges under Article 6 of PMA 100 (Pl. Ex. 10) because of its failure to issue Delivery Notices in the original delivery period.

other minor matter was covered—an increase in price for export packaging. There was no reference to Rosenberg's claim for damages for CCC's breach of contract.

Upon receipt of the telegram on January 27, 1948, Grady telephoned to Allmendinger (CCC's Contracting Officer), suggested that a simpler procedure would be to extend the contracts, and advised Allmendinger of Rosenberg's pending claim against CCC and that he did not wish to prejudice that claim. Grady testified that Allmendinger replied that the claim did not concern him and he was only interested in whether Rosenberg would *ship* (R. 270). Allmendinger could not remember his response (R. 607), but on cross-examination admitted that as a Contracting Officer of CCC he had no authority to settle Rosenberg's claim (R. 617-618). Grady then sent a telegram confirming an agreement to extend the period for shipment, and requested shipping instructions (Pl. Ex. 33). Upon receipt of this telegram, Allmendinger called Grady and told him he did not construe his first wire as an agreement that Rosenberg would *ship*. Grady made notes of a supplemental telegram suggested by Allmendinger on his copy of the first one sent by him (R. 270-273; Pl. Ex. 34), and Grady then sent the suggested telegram (Pl. Ex. 35) accepting the price increase for export containers and stating Rosenberg's intention to deliver under *Contract 1893*. Allmendinger was still not satisfied and called Grady again informing him that it was possible to construe his first wires as not agreeing completely to *ship* and *waive carrying charges on Contract 1647* if delivery notices were issued (R. 613). In a third telegram (Pl. Ex. 36), Grady expressly agreed to *ship* and *waive carrying charges under Contract 1647*. Allmendinger also testified to a telephone conversation with Grady on January 27 or 28, 1948, in which he informed Grady that CCC would issue shipping instructions if he accepted the proposal in Allmendinger's January 26, 1948, telegram; and that CCC would not agree to recognize Rosenberg's claim. He referred

to a memorandum which he testified contained notes of this conversation. On cross-examination, he admitted that the memorandum also reflected his conversations with other packers, and that generally speaking his whole recollection of his conversation with Grady appeared in his notes (R. 619-622). Allmendinger also admitted that the memorandum covered only his own comments and did not reflect Grady's responses (R. 623).

The references in Allmendinger's telegram (Pl. Ex. 32) to *contract price* are equivocal. If CCC intended to extract a waiver of Rosenberg's claim for *damages*, it should have so stated. It did not. Rosenberg's replies to Allmendinger's telegram were strictly limited assents and in no sense related to Rosenberg's *damage* claim. The first reply (Pl. Ex. 33) confirmed Rosenberg's agreement to "*extend period for shipment* as outlined your wire." It contained no reference to price. The second reply (Pl. Ex. 34) dealt only with a small price adjustment for export packing, and stated Rosenberg's intention to "*deliver raisins*" under Contract 1893. The last telegram (Pl. Ex. 36) was merely an agreement to "ship" and "waive carrying charges" under Contract 1647. The very fact that so many specific replies were necessary demonstrates that Rosenberg agreed only to what was stated in its responses and no more. If Rosenberg was not concerned with reserving its rights to claim damages, it could have sent a general acceptance to *all* terms contained in Allmendinger's wire.

Rosenberg did not intend to waive its claim for damages for breach of contract, but, as a matter of fact, reserved it, and continued its protests to CCC and the Department of Agriculture. Appellant characterizes Allmendinger's comments when Grady told him of his efforts to get relief for Rosenberg in Washington, as a "rejection" of Grady's proposed reservation of rights. Nothing could be farther from the fact. Allmendinger lacked power either to accept or reject any proposal for compromise of Rosenberg's claim against CCC; he was concerned only with *shipment*, and he told Grady

that in so many words (R. 270, 617-618). Grady specifically told Allmendinger that he did not intend, by agreeing to ship, to waive Rosenberg's claim (R. 276-277).

When asked by the District Court, to point out evidence of Rosenberg's alleged waiver, Counsel for Appellant, indeed, admitted that he was "not able to point to anything in the record in which the Government or Rosenberg made any definite commitment about the breach" (R. 665). Waiver is a matter of fact. It is an affirmative defense to be proved by CCC.

Rule 8(c), *Fed. Rules of Civ. Proced.*;

4 *Cyc. Fed. Proced.* (2d Ed.) § 1322, p. 643.

The District Court found that Appellant did not sustain its burden of proof, and that Rosenberg had not as a matter of fact waived its rights (Findings 39, 41). Its findings should not be disturbed on appeal.

2. Rosenberg Has Not, as a Matter of Law, Waived Its Rights.

There is no evidence in the record of an express waiver by Rosenberg and Appellant does not claim one. To find implied waiver there must be "unequivocal and decisive acts or conduct of the party clearly evincing an intent to waive, or acts or conduct amounting to an estoppel on his part." *Yates v. American Republic Corp.*, (C.C.A. 10, 1947) 163 F.2d 178, 180.

See also:

Wilkinson & Co. v. McKinley, (1948) 84 C.A. 2d 100,
190 P.2d 35.

Not only is the record barren of any unequivocal conduct of Rosenberg amounting to waiver, but it contains substantial evidence of Rosenberg's unceasing efforts to preserve its rights and to secure redress.

Performance after Rosenberg's limited agreement to ship and waive carrying charges did not constitute waiver. It was merely

an election by Rosenberg to perform rather than rescind for CCC's breach.

Bu-Vi-Bar Petroleum Co. v. Krow (C.C.A. 10, 1930) 40 F.2d 488, 490;

Winans v. Sierra Lumber Co. (1884) 66 Cal. 61, 4 Pac. 952;

5 *Corbin on Contracts* (1951 Ed.) § 1105, p. 469.

Rosenberg's completion of the CCC payment vouchers and acceptance of payment thereunder did not waive its right to claim damages for CCC's breach of contract. The United States District Court in *Lundstrom v. United States* (D. Ore. 1941) 53 F. Supp. 709, *aff'd* (C.C.A. 9, 1943) 139 F.2d 792, rejected just such a contention, stating at page 711:

"Finally, the plaintiffs did make out vouchers with certificates * * * in which the price named * * * was set down as 'correct and just.' A condition of a contract may be waived, a right for damages for breach thereof cannot be. It is not an estoppel against their claiming the amount which may be justly due under the contract. There was no way in which otherwise any payment could be obtained. * * * Everyone knows if one who has money due from the United States does not conform meticulously to the regulations as to vouchers no money will be paid * * * Here a certification that the statement is 'correct and just' should not prevent plaintiffs from receiving payment for the work actually done. The United States did not rely upon such vouchers as indicating that no claim for extras would be made. The money paid was certainly justly owing. The question here is whether the United States does not owe more."

See also:

Blair v. U. S. (C.C.A. 8, 1945), 147 F.2d 840, *mod. in other respects* (C.C.A. 8, 1945) 150 F.2d 676.

None of the cases cited by Appellant on pages 65 and 66 of its Brief are in point here. In none of them was there a breach of contract. They all involve consent to contract terms rather than a waiver of damages for breach of contract by the other contracting party.

CCC's waiver of damages on account of Rosenberg's failure to deliver during the contract period is neither evidence of nor consideration for a waiver by *Rosenberg* of its claim for *damages* for CCC's breach of contract. The exchange of telegrams between Grady and Allmendinger clearly establishes that the *quid pro quo* for CCC's waiver of damages for nondelivery was Rosenberg's agreement to *ship* and its waiver of carrying charges on account of CCC's failure to order out the raisins during the contract delivery period. Rosenberg's claim for damages for breach of contract by CCC was in no way involved in the transaction.

IV. Rosenberg Is Entitled to Damages in a Greater Sum Than Allowed by the Trial Court.

Appellant concedes the validity of the formula suggested for calculation of damages: the difference between what Rosenberg paid for raisins furnished to CCC and what Rosenberg would have paid had there been no government interference. But Appellant differs from Appellee as to the application of the formula and argues (1) that Appellee's lowest cost raisins should be used because Appellee has failed to establish any other formula for damages, and (2) that Appellee has failed to establish the level at which Rosenberg could have acquired raisins had the government not interfered. Neither of these arguments is valid.

A. ROSENBERG WOULD HAVE BEEN ABLE TO COVER ITS CCC COMMITMENTS AT \$110 OR LESS PER TON HAD CCC NOT CHANGED ITS PURCHASE PROGRAM.

The trial court's findings (Findings 35, 50) that Rosenberg could have covered its CCC commitments at \$110 or less but for

CCC's breach of contract is a finding of fact, supported by substantial evidence and should not be disturbed on appeal.

Dwight Grady, a well-qualified expert on raisins, testified that in the considered judgment of himself and his associates, had it not been for CCC's change in program, Rosenberg could surely have bought raisins at \$110 or less to cover its CCC contracts (R. 218). While counsel for Appellant might not have agreed with Mr. Grady, there is not one scintilla of *evidence* in the record to contradict Grady's expert opinion. The Appellant's marketing expert, S. R. Smith, heard Grady's testimony but did not contradict his analysis of the raisin market. Smith himself, testified that the market did reach a level of \$110 in late October (R. 500). Grady's opinion was also confirmed by the action of the raisin market. Immediately before the changes in CCC's program were announced on October 14, and at the time of Rosenberg's second offering to CCC, the market was very close to \$110 per ton (R. 233; Pl. Ex. 44, p. 7; Def. Ex. K, Bulletin Nos. 399, 400). Rosenberg bought some raisins at that price (R. 233).*

At the time of Rosenberg's offer under Announcement No. 1, the raisin market had not yet been established. Bids at a level of \$125 were for early season deliveries. 1947 crop raisins were not yet made, and the volume of trading was small (Def. Ex. K). The best possible indication of the market was the bid of Sun Maid under Announcement No. 1. Sun Maid, a grower cooperative, offered 10,000 tons of raisins to CCC at \$153.32 per ton (Pl. Ex. 54). Using the "spread" between processed and natural condition raisins of \$40 per ton (Finding 23), this bid reflected a field price of approximately \$113 per ton. The fact that the market had declined to \$110 or less per ton at the time of the second CCC call is bolstered by packer bids at that time (Pl. Ex. 54). The high bid (Rosenberg's) was \$149.40, reflecting a grower price of

*Appellant misquotes Grady when it alleges he stated Rosenberg was unable to buy at \$110 per ton (App. Op. Br. p. 77).

\$109.40 per ton. The low bid reflected a grower price of \$102.56 per ton, and Sun Maid's bid, again for 10,000 tons, reflected a grower return of \$105.48 per ton. Sun Maid's bids are entitled to great weight since they represent a *grower* estimate of market conditions on a very substantial tonnage. In the light of these bids, Grady's testimony was, if anything, a conservative estimate of the situation.

Rosenberg's failure to close raisin purchase contracts at the market levels prevailing in September and early October was not due to its lack of efforts. Grady testified that Rosenberg buyers were constantly canvassing growers (R. 205, 639). Rosenberg did in fact acquire substantial quantities of raisins during the latter part of this period on open contract (Def. Ex. AC).

B. THE CHANGES IN CCC'S RAISIN PURCHASE PROGRAM WHICH APPELLANT HAS ASSIGNED AS BREACHES OF CONTRACT FORCED THE RAISIN MARKET UP TO LEVELS OF \$130-\$135 PER TON.

The trial court's finding that CCC's breach of contract was the proximate cause of the additional cost to Rosenberg of raisins acquired for its CCC contracts (Findings 34, 43) is supported by substantial evidence and should not be disturbed on appeal.

Out of the mouths of the Department of Agriculture's own experts comes *uncontradicted* evidence that the changes in CCC's 1947 raisin program forced the natural condition raisin market upward, first to a level so unreasonably high that CCC rejected all grower bids,* and then to a level still substantially in excess of \$110 per ton. The market stabilized at \$135 per ton in late November and remained at \$130-\$135 until it broke in January, 1948 (Pl. Ex. 44, p. 55).

*In its announcement of November 26, 1947 (Pl. Ex. 24), CCC rejected all grower bids made pursuant to its October 14 invitation to growers to enter bids. The rejection was based on the fact that grower bids all exceeded \$135 per ton. The District Court's reference to "abnormally and artificially high levels" (R. 79) criticized by Appellant (App. Op. Br. p. 81, note) is undoubtedly based on this action of CCC.

The Annual Summary of Market Conditions published jointly by the U. S. Department of Agriculture and the California State Department of Agriculture (Pl. Ex. 44) summarizes conditions in the following words:

"The Governmental announcement October 14 of the intended purchase of an additional 60,000 tons of Thompsons introduced the second phase and changed the supply picture abruptly to make available quantities appear in line with minimum trade needs. Demand for grower crops increased sharply as packers sought to cover previous sales and accumulate stocks. Growers turned strong holders, partly under strong urging by grower groups and partly in expectation of selling direct to CCC at higher prices. Grower bid forms became available November 5 and a large tonnage offered to CCC was removed from possibility of packer purchase until rejection of those bids November 26. Between October 15 and November 5 there was very little trading between growers and packers although prices had worked up to \$135.00 per ton. Sales by commercial packers to the distributing trade were largely stalemated in this period by inability to obtain supplies to offer. Moderate grower selling started November 5, at \$135.00 and heavy sales were made the next two or three days when packer offers were jumped to \$140.00. Growers also sold freely a few days later when packers offered \$135.00 for a couple of days. Heavy sales at the \$140.00 and \$135.00 prices included both previously uncommitted lots and closing of a majority of the outstanding open price contracts.

"The change in the governmental program announced November 26 to require payment to growers of \$135.00 per ton for raisins for future sale to CCC plus purchases by this agency November 26 as high as \$175.00 for processed raisins put packers back in the field market actively just after Thanksgiving at \$135.00 * * *."

The fact that the Federal State Market Reports (Def. Ex. K) discloses no appreciable rise in price after the October 14 an-

nouncement until October 30 does not detract from the finding of the trial court that the changed program was responsible for the rise. The immediate effect of the announcement was to bring trading to a standstill, and no significant volume was sold (Def. Ex. K, Bulletin Nos. 401-402). Growers were not inclined to sell to packers in view of CCC's impending purchase directly from them (Pl. Ex. 50, p. 2). When trading did resume, it was at substantially higher levels (Def. Ex. S). The packers' demand to fulfill their commercial orders was the direct result of CCC's changed program. Packers' commercial sales had not increased. It was CCC's removal of 60,000 tons from the *supply* side of the market which stimulated packer demand. (The language quoted above from Pl. Ex. 44 demonstrates this fact.)*

The November 26 announcement of the Department of Agriculture (Pl. Ex. 24) indicating that grower bids over \$135 were excessive, and requiring certification by packers that they had paid growers \$135 per ton on future sales to CCC, helped to stabilize the field market at \$135 per ton, and active trading, commenced at that figure (Def. Ex. S, Bulletin No. 407). This affected the whole raisin market, not merely the limited future offerings to CCC. Grady testified that the volume of CCC's call was such that it supported the whole market price (R. 251-252). Even though November 26 was a date near the end of the period originally fixed for deliveries under Contract 1647, CCC is nevertheless responsible for the effect of its announcement on that day. Its action of October 14 had substantially hindered the packers in their attempts to cover their CCC contracts, since it reduced the supply of raisins, and growers offered raisins to CCC rather than to packers until all grower bids were rejected on November 26.

*Appellant attempts to support its argument that seasonal demand of packers, rather than the changes in CCC's program, caused the rise in price by reference to the market price for other varieties of grapes (App. Op. Br. p. 79, note), but this argument is mere speculation, and it refutes itself when the prices for Sultanias and Zantes are examined.

CCC was responsible for Rosenberg's inability to cover its commitments to CCC and to deliver in accordance with its original delivery schedule. Its action of November 26 damaged Rosenberg because it was consequently in a short position on that day.

When Appellant speculates that grower resistance, rather than CCC's additional purchases, maintained prices at high levels (App. Op. Br. p. 80), it ignores the fact that the trial court found otherwise. This is a finding on a matter of fact, and is sustained by the level of the market *before* the increase in CCC's purchase, as well as by Grady's testimony that there was a large surplus and even Setrakian could not change the laws of supply and demand (R. 204). The District Court evidently believed this evidence and ruled against Appellant's contention. Its finding of fact cannot be disturbed on appeal.

C. ROSENBERG'S BUSINESS PRACTICES AND OTHER EVIDENCE ESTABLISH THE PRICE AT WHICH ROSENBERG COSTED RAISINS TO COVER ITS CCC COMMITMENTS.

Rosenberg purchased Thompson seedless raisins on both open and closed contracts. The latter type of purchases are at a fixed price. Open contract purchases may be closed, at the option of the seller-grower, at any time when Rosenberg is buying at the price Rosenberg is then offering. If not closed by a certain date, such contracts, by their terms, are closed at the market price ruling seven days after their terminal dates. Both open and closed contracts immediately passed title to Rosenberg. Under either type of contract, once raisins were made, Rosenberg could, at its own convenience, take possession of its purchases, since producers bore the risk of loss on undelivered fruit and were ready to deliver at any time (Finding 46; Pl. Ex. 52).

Raisins are fungible goods (Finding 45) and specific *physical* lots of raisins cannot be allocated to specific *shipments* under sales contracts. The problem of costing the raisins *sold* to CCC is

not however one of physical identification of raisins *shipped*. It is an accounting problem solved by reference to Rosenberg's business practices. Dwight Grady testified that Rosenberg's business practice was to "buy raisins as it sold" (R. 338-340), and that its practice was to "acquire raisins to meet its commitments at the time we have commitments." He also stated: "When we make a sale we try to buy raisins to cover that sale * * *. The way to minimize any risk is to buy as rapidly as you can to cover your commitments" (R. 251). These statements taken together with Rosenberg's method of keeping its "trading bible", i.e., entering purchases as contracts were closed and sales as the sales contracts became firm (R. 322-323, 332) demonstrates that Rosenberg's business practice was to cost raisins sold on a *first-in first-out basis*.

The fact that Rosenberg regarded its CCC sales as firm commitments is evidenced both by the fact that it prepared sales tags (Def. Ex. C) for its CCC sales on or about the dates its offers were accepted,* and by the record of its raisin purchases in 1947.

*Appellant's hopeful speculation that Rosenberg did not treat its CCC contracts as firm sales until January, 1948, because they were not entered in the body of the trading bible is contradicted by the record. The trading book was neither a book of original entry, nor an accurate record. It aimed only at substantial accuracy to present an overall picture. The original entries were made on sales tags (Def. Ex. C) at or about the date Rosenberg's offers to CCC were accepted. These sales tags were shown to Mrs. McIntosh, who kept the sales book, on or about the date they bear (R. 327). She did not enter them on account of Mr. Oppenheimer's instructions (R. 328), but he also told her not to enter a sales tag covering a third sale of 2,000 tons of raisins to CCC about which there never was any controversy (R. 329). Mrs. McIntosh had no reason to believe Oppenheimer would forget such large sales (R. 331). In fact, Oppenheimer told Mrs. Chase, at or about the date of the sales tags, "to keep the CCC sales in mind" when figuring the company's long or short position (R. 332). Entries were even made in the margin of the trading bible so that these sales would not be overlooked (R. 330). Probably the only reason Rosenberg did not enter the CCC sales in the body of the book (which showed an average price on sales) was Rosenberg's effort to *renegotiate price*. When that effort failed, Rosenberg decided to ship and claim its damages for breach of contract. At that time the CCC sales were entered in the body of the trading book.

It should be remembered that Rosenberg was bound to accept all raisins which it acquired under open contract as well as those which it acquired at fixed prices.

The record of its acquisitions under open *and* closed contracts demonstrates that Rosenberg bought raisins at a far greater rate than would have been necessary to meet its civilian sales commitments (Def. Ex. AC, Col. 20). Thus, by mid-October, Rosenberg had acquired title to and was bound to accept delivery on 50% of its entire 1947 acquisitions (Def. Ex. AC, Col. 10). By November 25, 1947, Rosenberg had acquired several thousand tons *more* raisins than its *total* civilian sales to date, and had enough raisins under open and closed contract to cover almost all its civilian sales (including those made at a later date) for the *entire* crop year (Def. Ex. AC, Col. 10, 18). By December 12, 1947, the date on which the District Court stated Rosenberg commenced acquiring raisins for its CCC contracts (R. 63, 65), Rosenberg already had thousands of tons *more* raisins under purchase contract than its *total* civilian sales for the *entire* year (Def. Ex. AC, Col. 10, 18). The trial court's premise in commencing, on December 12, 1947, to *cost* the raisins delivered to CCC was that Rosenberg did not begin to *acquire* raisins for its CCC contracts until that date. Its error is obvious. The record of Rosenberg's actual purchases shows that the raisins acquired for Rosenberg's CCC contracts must be costed commencing with an earlier date.

There is uncontradicted evidence in the record that Rosenberg had in fact *acquired* and *costed* its raisins for the CCC contracts by the end of January, 1948. On January 22, 1948, Rosenberg wrote CCC that it was "now in a position to make deliveries" on its CCC contracts (Pl. Ex. 30), indicating that it had acquired the raisins for CCC by that date.

On February 4, 1948, Dwight Grady wrote Cummings that Rosenberg did not dare refuse CCC's shipping notices because of the danger "we might wind up with the raisins still on our hands" (Def. Ex. D). This indicates raisins for CCC were *in Rosenberg's hands* by that date.

The reference to \$133.60 in Allmendinger's notes of his conversations with Grady dated January 27, 1948 (Def. Ex. U), was probably occasioned by Grady's reference to the cost of the raisins acquired for the CCC contracts. Allmendinger's recollection was that the figure "\$133.60" referred either to the price at which Rosenberg had covered or at which it would have to cover its CCC commitments. When Allmendinger was reminded that on January 27, the date of the conversation to which his notes referred, the raisin market stood at a level far below \$133.60, he reluctantly admitted that if he were trying to reconstruct the conversation the more logical interpretation of the figure would be that *Rosenberg had already covered its CCC commitment at that price* (R. 606, 625-626).

On January 23, 1948, Grady wrote Downey that Rosenberg's loss in fulfilling its contracts to deliver 14,330 tons of raisins to CCC would be in excess of \$315,000 (Pl. Ex. 31). The closeness of this figure to Appellee's calculation of damage on a first-in first-out basis* is not mere coincidence. It evidences the fact that Rosenberg did in fact *cost* the raisins it furnished to CCC on a first-in first-out basis. Grady's conversation with Allmendinger confirms this fact. It is also worthy of note that all of the above communications were written within a few days of the date (January 20-26, 1948) on which Appellee's calculation shows such acquisitions were completed and costed (Appendix A). This evidence as to Rosenberg's actual business practices *at the time when its loss occurred* requires that the raisins furnished to CCC be costed on a first-in first-out basis in calculating Rosenberg's damages.

There is ample legal precedent for costing the raisins on a first-in first-out basis. The first-in first-out rule has often been applied to similar situations. It is used in the absence of any other method

*The calculation of Rosenberg's loss on this basis is attached as Appendix A to this brief.

of identification to determine the cost basis of stock sold for federal income tax purposes.

Perkins v. U. S. Ct. of Claims (E.D.N.Y. 1935), 12 Fed. Supp. 481, *cert. den.* (1936) 297 U.S. 710, 80 L.Ed. 999;
Vawter v. Commissioner (C.C.A. 10, 1936), 83 F.2d 11, *cert. den.* (1936) 299 U.S. 578, 81 L.Ed. 426;
Helvering v. Campbell (1941), 313 U.S. 15, 85 L.Ed. 1159, *rehg. den.* (1941) 313 U.S. 598, 85 L.Ed. 1551.

In the field of trusts, in the absence of evidence of any particular method of allocation, the first-in first-out rule is used to determine the order of withdrawals and to trace the disposition of trust funds where there has been commingling of trust assets.

In re Hallett's Estate, 13 Ch. Div. 696;
Empire State Surety Co. v. Carroll Co. (C.C.A. 8, 1912), 194 Fed. 593.

The same principle is used, in the absence of other evidence indicating a method of allocation, in the case of payments out of a fund or bank account which is insufficient to cover all disbursements,

Clayton's Case (1816), 1 Meriv. 572;
Lowden v. Northwestern Nat. Bank & Trust Co. (C.C.A. 8, 1936), 84 F.2d 847, *cert. den.* (1936) 299 U.S. 583, 81 L.Ed. 430, *mod. den.* (C.C.A. 8, 1936), 86 F.2d 376;
Heine v. Degen (Ill. 1935), 199 N.E. 832;
In re Hotel Martin Co. (C.C.A. 2, 1936), 83 F.2d 231;
Fischbach & Moore v. Philadelphia Nat. Bank (Pa. 1939), 3 A.2d 1011.

and in case of payments by a debtor which are not allocated and which are equally applicable to two or more obligations.

Calif. Civ. Code, § 1479(3);
 70 C.J.S., *Payment* § 72.

A fortiori, the first-in first-out rule should be used in the instant case because of the affirmative evidence showing it was *actually used* by Rosenberg in costing the raisins furnished to CCC. It is peculiarly appropriate because of the nature of the business. Raisins are a semi-perishable product, and in the normal course of operations, a raisin packer would dispose of his oldest goods first in order to minimize spoilage and shrinkage and to sell raisins while they retain their best appearance.

Even if the court is of the opinion that Rosenberg has not established its business practice of costing raisins on a first-in first-out basis, there is uncontradicted evidence that raisins for the CCC contract were acquired and costed before January 26, 1948. Under such circumstances, the court should have used the average cost of raisins acquired under closed contract through that date.*

Appellant's "minimum cost" theory (App. Op. Br. pp. 75-76) does not apply in this case. The cases which Appellant cites to support it are far different from the case here on appeal. Neither *Jones Appeal*, 62 Pa. 324, nor *U. S. v. Northern Pacific Ry. Co.* (D. Minn.), 116 Fed Supp. 277, dealt with fungible goods or a situation like the one before this court, where there is a logical method, actually used, to cost the raisins in question. The problem in *Jones Appeal* was the value, in a breach of contract action, of an annuity of \$1,500 for life, which was to be reduced to \$500 if the beneficiary remarried. The court fixed the present value of the annuity on the basis of a \$500 annual income because it had *no method* of determining in advance whether the plaintiff would remarry. The issue in the *Northern Pacific* case was the value of potatoes lost in transit by a common carrier. The court selected the price fixed in a contract of sale with the consignee, rather than market value, as the measure of the consignor's damages, on the theory that the measure chosen would *fully compensate* the consignor even though the market price was higher.

*A calculation of Rosenberg's loss on this basis is attached as Appendix B to this brief.

CONCLUSION

Appellant's statement about the equities of this case is an amazing interpretation of the facts in the record. Appellant states that CCC's 1947 raisin program was designed to stimulate purchases and stabilize prices at a level not ruinous to the grower. Yet it left a known 40,000 ton surplus overhanging the market, and it called for *competitive* bidding; CCC summarily rejected the criticisms and suggestions of Rosenberg and other packers to stabilize and improve grower returns; CCC awarded contracts to the *lowest* bidders and called for bidding in two stages so that the competition was even keener on the second call; CCC refused to release the low bidders from their contracts though Rosenberg offered to release growers who had sold at less than \$140 per ton; and CCC refused to make any adjustment though its change of program "put a squeeze on the processors."

It is even more surprising that upon such facts, Secretary Anderson should bear such malice toward the packers and should accuse them of "ganging up on the growers" and "trying to gut the people", and state that he was "trying to teach the packers a lesson", that they "could not buck a four billion dollar corporation" (R. 243-244; 306-309; 447). It is equally amazing that counsel for Appellant in its brief should accuse Rosenberg of failing to cooperate and "beating down the price." Sun Maid, a grower cooperative, bid at the same level as Rosenberg and other packers, and it is inconceivable that it would try to "beat down the price" or "gut" its own members. Rosenberg's use of open price contracts early in the 1947 season resulted not from its own reluctance to buy and its alleged desire to "wreck the program", but from grower resistance to selling, in large part engendered by CCC's own conduct. CCC itself rejected grower offerings at the level at which Rosenberg refused to buy.

The faults and economic deficiencies of CCC's 1947 raisin purchase program as announced on September 5, 1947, were CCC's own. The record establishes that Rosenberg realized these deficiencies and at the very beginning offered constructive criticisms and suggestions for improvement of the program. When its criticisms and suggestions were rejected and it was solicited to cooperate to make the program "as announced" a success, Rosenberg, in the belief that no changes would be made, in good faith, offered raisins to CCC on the basis of CCC's original purchase program. It bid at approximately the same level as all the other packers whose bids were accepted. When CCC violated its implied contract not to hinder or render Rosenberg's performance more expensive by announcing a changed program on October 14th, Rosenberg immediately requested cancellation of its commitments and in turn offered to release growers under firm commitment to sell raisins to Rosenberg at less than \$140 per ton. This would have enabled the growers to participate in the benefits of the changed program. Acceptance of this recommendation would have assured producers an adequate return for their raisins and would have relieved packers from the inequitable losses caused by CCC's changes of program. Upon receipt of this request, S. R. Smith recommended renegotiation of prices in the packer contracts with CCC. This recommendation was made by a conscientious and conservative public servant. Nevertheless, it was rejected by the Board of Directors of CCC acting under the leadership of Secretary Anderson. The equitable nature of Rosenberg's claim was apparently overridden by a sense of self-justification and an over-exaggerated desire to protect the reputations of the public officials responsible for the packers' dilemma.

Law, as well as equity requires a decision in favor of Appellee. Appellant cannot hide behind the cloak of sovereignty to escape liability for CCC's contractual acts. CCC's conduct unquestionably violated its implied contract not to hinder or render more expen-

sive Rosenberg's performance of its executory contracts to sell raisins to CCC. Appellant has not waived its rights, but has continuously and persistently pursued them. Finally, Appellee has established its damages, and this honorable court should correct the error of the District Court and grant Appellee the damages to which the evidence shows it is entitled.

Dated May 17, 1956.

Respectfully submitted,

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(Appendix Follows)



Appendix A

CALCULATION OF APPELLEE'S LOSS ON FIRST-IN FIRST-OUT BASIS*

(A) Cost of raisins to cover CCC Contract 1647 (10,000 tons)

Civilian sales commitments on 1947 crop raisins prior to 9/23/47 (date of Contract 1647).....	7,224.56 tons†
Quantity of natural condition raisins costed to cover pre-9/23/47 civilian commitments.....	7,685.70 tons‡
Period during which costing of pre-9/23/47 civilian commitments completed	11/4 - 11/10/47
Raisins costed to cover CCC Contract 1647:	

<i>Period ending</i>	<i>Tonnage</i>	<i>Average price per ton</i>	<i>Cost</i>
11/10/47	1,016.89	\$142.02	\$144,418.72
11/17/47	4,931.98	135.34	667,494.17
11/24/47	1,111.67	128.54	142,894.06
12/1/47	3,577.76	133.66	478,203.40
Total....	10,638.30‡		\$1,433,010.35

(B) Cost of raisins to cover CCC Contract 1893 (4,330 tons)

Civilian sales commitments on 1947 crop raisins prior to 10/13/47 (date of Contract 1893) plus commitment under CCC Contract 1647.....	20,185.55 tons†
Quantity of natural condition raisins costed to meet pre-10/13/47 civilian commitments and commitment under CCC Contract 1647.....	21,473.99 tons‡
Period during which costing of above completed.....	12/9 - 12/15/47
Raisins costed to cover CCC Contract 1893:	

<i>Period ending</i>	<i>Tonnage</i>	<i>Average price per ton</i>	<i>Cost</i>
12/15/47	19.95	\$128.44	\$2,562.38
12/22/47	2,045.76	128.90	263,698.46
12/30/47	615.05	119.42	73,449.27
1/5/48	340.54	122.40	41,682.10
1/12/48	1,090.72	117.00	127,614.24
1/19/48	437.53	112.86	49,379.64
1/26/48	56.83	109.04	6,196.74
Total....	4,606.38‡		\$564,582.83

*Based on Pl. Ex. 45, 46, 53.

†Includes export sales (Pl. Ex. 53) and domestic sales (Pl. Ex. 47).

‡A 6% shrinkage factor has been used to convert natural condition tonnage to processed weight. (Processed weight ÷ .94 = natural condition tonnage.)

(C) Calculation of loss

Raisins costed to cover:

CCC Contract 1647.....	10,638.30 tons	\$1,433,010.35
CCC Contract 1893.....	4,606.38 tons	564,582.83
Total cost.....	15,244.68 tons	\$1,997,593.18

Less cost of 15,244.68 tons of natural condition raisins

at \$110.00 per ton*..... 1,676,914.80

Loss on CCC Contracts..... \$320,678.38

*The District Court found that had it not been for CCC's change in program in October and November, 1947, Appellee would have been able to cover the CCC commitments at \$110.00 per ton (Finding 24, 35).

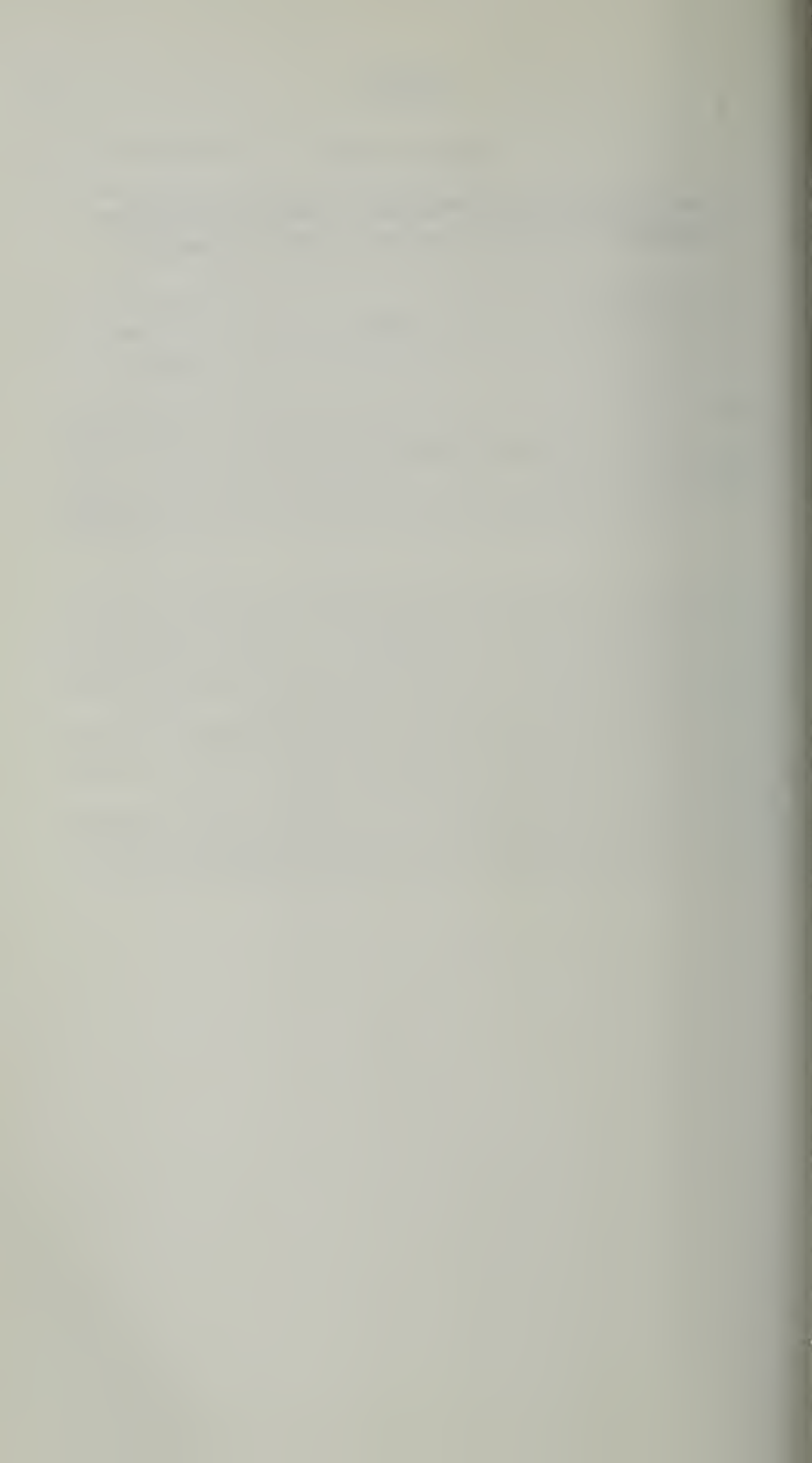
Appendix B**CALCULATION OF APPELLEE'S LOSS ON BASIS OF
AVERAGE COST OF RAISINS 9/23/47 - 1/26/48***

<i>Tonnage acquired</i>	<i>Value</i>	<i>Average cost per ton</i>
9/23/47-1/26/48		
23,641.35 tons	\$3,111,550.64	\$131.61
Cost of 15,244.68 tons of raisins† at \$131.61 per ton.....		
\$2,006,352.33		
Less cost of 15,244.68 tons of raisins at		
\$110.00 per ton*.....		1,676,914.80
Loss on CCC Contracts.....		<u>\$329,437.53</u>

*This appendix is prepared from data contained in Pl. Ex. 46. These dates have been chosen because Rosenberg's first offer to CCC (Contract 1647) was accepted on 9/23/47, and because 1/26/46 is the end of the period on Plaintiffs Exhibit 46 during which Appellee informed CCC that it had acquired the raisins to cover its CCC commitments.

†14,330 tons of processed raisins were included in Contracts 1647 and 1893. On the basis of a 6% shrinkage factor, 15,244.68 tons of natural condition raisins are required to produce this tonnage.

*The District Court found that had it not been for CCC's changes in program in October and November, 1947, Appellee would have been able to cover its CCC commitments at \$110.00 per ton (Findings 24, 35).



IN THE
United States Court of Appeals
For the Ninth Circuit

COMMODITY CREDIT CORPORATION, *Appellant*

v.

ROSENBERG BROS. & Co., INC., a Corporation,
Appellee

and

ROSENBERG BROS. & Co., INC., A Corporation,
Appellant

v.

COMMODITY CREDIT CORPORATION, *Appellee*

On Appeal from the United States District Court for the
Northern District of California, Southern Division

REPLY BRIEF FOR THE UNITED STATES

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FILED

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IN THE
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For the Ninth Circuit

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REPLY BRIEF FOR THE UNITED STATES

INTRODUCTORY STATEMENT

The appellee has submitted a brief arguing:

1. That the modification of the dried fruit program was a commercial, proprietary act as to which the Government has no sovereign immunity.

2. That the change in program breached the Government's implied promise to refrain from any act

which would increase Rosenberg's cost of performance.

3. That Rosenberg did not waive the alleged breach.

4. That the trial court erred in its computation of damage.

The Government's reply brief will discuss each of these points in the same order.

ARGUMENT

I.

THE ISSUE OF SOVEREIGNTY

Although appellee argues this question with considerable vigor, we believe that an elaborate discussion of appellee's contentions will serve no useful purpose. An examination of the statute under which CCC operates,¹ and of the docket in question (Pl. Ex. 5), should dispel any doubt concerning the nature of the dried fruit price support program. CCC was patently engaged in a program designed to shore up a segment of the economy which was likely to be in deep distress.

Appellee, to dramatize its contention, declares that if all Governmental acts are sovereign, the Government would "never be liable for any of its acts"

¹ Appellee complains that appellant refers to a budget not offered in evidence. The budget referred to is the Budget of the United States Government for 1948, and the material quoted appears at p. 1193, et seq. The Budget is an official document expressly adopted by the Appropriation Act, Public Law 266, 80th Congress, 1st Sess., approved June 30, 1947; and is most assuredly a document of which this Court can take judicial notice. *United States v. Brewer-Elliott Oil & Gas Co.*, 249 F. 609, 619, aff'd. 260 U.S. 77; *Atlantic Transport Co. v. Rosenberg Bros. & Co.*, 34 F. 2d 843, (C.A. 9).

(Appellee's Brief p. 37). This is a correct statement of the law. The Government cannot be sued unless it has waived its sovereign immunity. Congress has waived the Government's immunity from suit in many—but not all—respects; it now permits suits against the Government for breach of contract and for certain torts of its employees, and suits against certain Government corporations by "sue and be sued" provisions. In the instant case, the waiver of immunity is claimed by virtue of 15 U.S.C. 714(b) which authorizes CCC to sue or be sued.

The real questions posed are:

1. Whether the "sue and be sued" clause is a waiver of the Government's non-liability for damages caused by its sovereign acts.

2. Whether CCC has contracted to pay Rosenberg for damages resulting from CCC's exercise of sovereign powers. (This issue is discussed under the Implied Contract portion of this brief, pp. 6 to 14).

The courts have provided an unequivocal reply to the first question. The "sue and be sued" clauses waive the sovereign immunity against suit, *R.F.C. v. Menihan Corporation*, 312 U.S. 81; *United States v. Edgerton*, 178 F. 2d 763 (C.A. 2).² However, waiver of sovereign immunity merely permits the bringing of an action, i.e., vests jurisdiction in courts, and does not carry with it waiver of substantive rights and defenses available to the Government, *Summerlin v. United States*, 310 U.S. 414; *Korman v. United States*, 113 F.

² Under some circumstances, the power to sue Government agencies will be implied, *Keifer and Keifer v. R.F.C.*, 306 U.S. 381; *Federal Land Bank v. Priddy*, 295 U.S. 229.

2d 743 (D.C.A.); *Choy v. Farragut Gardens*, 131 F. Supp. 609, 613 (SD NY); *Lynn v. United States*, 110 F. 2d 586 (C.A. 5); *Pacific National Fire Insurance Co. v. TVA*, 89 F. Supp. 978 (W.D. Va.). As stated in *Atchley v. TVA*, 69 F. Supp. 952 (N.D. Ala.), which involved a suit to recover damages to crops due to flooding allegedly caused by TVA (p. 954):

The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to sue against an agency of the federal government. It does not engender liability in a case where liability would not otherwise exist.”

Also see *Chapman v. Sheridan-Wyoming Co.*, 338 U.S. 621.

One of the defenses available to the appellant is the fundamental precept that the sovereign is not liable for damages resulting from the exercise of its sovereign powers.³ (See our opening brief at pp. 25-31.) This

³ Appellee cites *Horowitz v. United States*, 267 U.S. 458, and *Marwell v. United States*, 3 F. 2d 906 (C.A. 4) aff'd. 271 U.S. 647, for the proposition that the United States is liable for its “actions as a contractor, performed in its proprietary, as distinguished from its sovereign capacity.” (Appellee’s Brief, p. 34). Appellee remains confused as to the basis of liability. The Government is not liable for its contractual acts merely because they are of a *proprietary* nature. The Government’s liability is founded upon its consent to be sued for violation of contracts into which it has entered, and not because of any hypothetical distinction between sovereign and proprietary acts. Furthermore, the two cases are not helpful to appellee’s cause. The *Horowitz* case is the leading authority on the subject of Government immunity from damages resulting from the exercise of sovereign power. In the case of *Marwell v. United States*, *supra*, the Government filed an action to recover extra expense resulting from the construction of a post office, following termination of the contract for failure to complete. The defendants alleged that the Government by reason of priority

defense disposes of the present action unless the Court concludes that CCC *contracted* to compensate Rosenberg for losses sustained as a result of program modification.

orders which kept the contractor from securing brick, had caused the delays which resulted in the termination of the contract. The Court held that this was not a valid defense, stating (p. 911):

The government in the exercise of its war powers, did what it could to put to the best possible use all available coal as well as the means for moving it. To this end it found it necessary to interfere with the ordinary freedom of trade and transportation. It issued priority orders and thereby kept the contractor's brickmaker from getting sufficient coal to burn the bricks he otherwise would have made. In consequence, the contractor was put not only to annoying inconvenience but to serious loss as well. There were hundreds of thousands of others to whom the same or similar orders brought like hardships. It is certain that they have no legal claim upon the government. In this respect, he is no better off merely because his contract was with it and theirs with private citizens.

Appellee also argues (Brief, p. 34) that the United States when acting in a commercial capacity is subject to the same rules as private persons, citing *United States v. Skinner & Eddy Corp.*, 28 F. 2d 373, mod. 35 F. 2d 889, and *R.F.C. v. J. G. Menihan Corp.*, 312 U.S. 81. This statement is correct where the commercial activity takes the form of *contract* as in the *Skinner & Eddy* case.

The *Menihan* case involved a suit by R.F.C. based on alleged infringement of a trade mark. There, jurisdiction rested on a "sue or be sued" clause, and the court held that the Government was liable for costs when it lost the litigation, the same as a private individual would have been.

Appellee also argues (Brief, p. 34) that different legal principles apply when the contracting agency performs the act complained of, citing *Beuttas v. United States*, 77 F. Supp. 933 (C. Cls.). The *Beuttas* language quoted by appellee is dictum. The case stands for two propositions: (1) that when the terms of a contract exclude an executive order, the contracting officer breaches the contract by requiring compliance therewith, and (2) that doubts concerning

II.

THE ISSUE OF IMPLIED CONTRACT

As indicated in our opening brief (p. 32), the opinion of the District Court does not clearly define the basis of liability. Nor does appellee's brief clarify the matter. It is unclear to us whether the District Court imposed liability because the Government, by changing the price support program, breached an implied agreement to refrain from any act which would increase Rosenberg's cost of performance, or because the Government breached express representations allegedly made by CCC that the program would not be altered. The District Court's opinion (R. 56) states that if the press release is part of the contract, CCC's change of program would constitute a breach of the *express* contract; but that if the formal contract represented the complete agreement of the parties, then the change in program would constitute a violation of the *implied* promise not to increase the cost of performance. Having stated its premise, the District Court proceeded to find that liability was predicated upon breach of the *implied* agreement, although it

the authority of Government officials, and doubts concerning the intention of the parties in executing the contract, cannot be resolved on demurrer.

We see no logic whatsoever in appellee's suggestion that the Government is liable for damages due to sovereign acts initiated by the same agency which makes the contract. The liability of the Government for breach of contract, and its non-liability for damages resulting from performance of a sovereign act, are based upon principles of law unrelated to, and not depending upon, matters of identity. See *Horowitz v. United States*, *supra*. Also see: *Maxwell v. United States*, *supra*.

plainly based its judgment upon the breach of alleged promises contained in *the press release* (R. 57-59).

Appellant believes that liability does not exist on either count.

From the Terms of the Formal Contracts It Cannot Reasonably Be Concluded That CCC Impliedly Agreed Not to Change the Announced Program

The formal contracts provided simply for the purchase of a specified quantity of raisins at a stated price to be delivered in a specified period.⁴ The contracts did not refer directly or indirectly to the announced program.

We believe that liability cannot rest solely upon the proposition that a contract to buy a commodity from "A" obliges the buyer to refrain from making other purchases, if such other purchases have the effect of increasing the market price (see our opening brief at pp. 33-39). Thus, if CCC had simply advertised for bids for a given quantity of raisins, and had contracted with Rosenberg for that quantity, and if CCC

⁴ Appellee characterizes the contract as a "piecemeal" contract (Brief, p. 55), which included the announcement of CCC's contemplated program. This characterization is unjustified. The contract is in evidence. It consists of the usual invitation to bid, offer and acceptance. The contract is complete in every sense, and appellee only terms it as "piecemeal" because the contract as written does not contain any clause upon which appellee can rest its case.

Appellee's quotation from *Bailey v. Railroad Co.*, 84 U.S. 96, states that "writings executed between the same parties * * * may be read together * * *". The announcement was patently not a contractual document "executed between the same parties." It was a public announcement of an official price support program, without any contractual element.

had later contracted to buy more raisins from other packers, with a consequent increase in market price, CCC would not have been liable to Rosenberg, and we believe that appellee does not so contend. For appellee states (Brief, p. 52) that "CCC is liable for damage to Rosenberg caused by its action inconsistent with that announcement" (of September 5).

We submit, then, that liability, if it exists at all, exists because of a representation made to Rosenberg that CCC would not buy more raisins than that indicated in the announcement, such a representation carrying with it an implied agreement to pay whatever damages were caused by breach of such a representation.⁵

⁵ In finding that CCC breached an implied agreement not to increase Rosenberg's cost of performance, the District Court relied, as does appellee, upon the case of *Sunswick v. United States*, 75 F. Supp. 221 (C. Cls.), cert. denied 334 U.S. 827. We have already pointed out the basic distinction between that case and the instant case (see our opening Brief at p. 43). It should also be noted that later cases and opinions suggest that the authority of the *Sunswick* case should be confined to the exact set of facts there present. See 34 Texas Law Rev. 315, 317, *Kirchhof v. United States*, 102 F. Supp. 770 (C. Cls.); *Ross Engineering Co. v. United States*, 127 F. Supp. 580 (C. Cls.); *J. B. McCrary Co. v. United States*, 84 F. Supp. 368 (C. Cls.). Also see *Shedd-Bartush Foods of Ill. v. CCC*, 135 F. Supp. 78 (Ill.).

A more parallel case is that of *Standard Accident Ins. Co. v. United States*, 59 F. Supp. 407 (C. Cls.), cited in our opening brief (p. 28) in connection with the issue of sovereign power. There, the Government, after executing a lump sum contract executed cost-plus-fixed-fee contracts in the same area, the effect of which was to increase the first contractor's cost of performance. In denying recovery, the Court pointed out that the contractor must have known of the National Defense and Appropriation Acts, and of the sovereign right of the Government to carry out the provisions

This brings us to a consideration of the nature of the press release, or announcement, as appellee prefers to term it.

The Press Release Was Not a Warranty That CCC Would Not Modify Its Announced Program

Neither the press release nor announcement of the tonnages to be purchased was referred to in the invitation to bid, the contract or specifications. Therefore, the appellee's claim does not fall within that category of cases where material representations contained in the contract are binding, despite other qualifying clauses. See *Hollerbach v. United States*, 233 U.S. 165, and *United States v. Stage Company*, 199 U.S. 414.

And although we might be tempted to classify the announcement as a preliminary negotiation, so that we could argue that it became merged in the written contract (*Simpson v. United States*, 172 U.S. 372), we cannot do so, since the announcement was not the result of negotiation, but was a unilateral declaration of a government price support policy.

Appellee, however, argues (Brief, p. 45) that the press release contained language which was so unequivocal as to constitute a flat representation which induced Rosenberg to execute its contracts. With the customary zeal of an advocate, appellee cites only that portion of the release which it believes will buttress

of those acts, "by contract, or otherwise" even though the Government's acts caused damage to Government contractors. So here, in offering to sell raisins to CCC, Rosenberg did so, knowing that the purpose of the program was price support, and that CCC would be free to accomplish that sovereign purpose "by contract, or otherwise," without incurring the liability herein sought to be imposed.

its argument. The Court, undoubtedly, will study the release, and we see no reason to dissect its language. But we do desire to point out that:

(1) There was no statement that CCC would not, if necessity required, modify its program.

(2) There were definite statements indicating the tentative nature of the program.

The release stated that CCC would purchase *up to* 133,000 tons of dried fruit, “*if* the purchase of this total quantity was necessary to provide outlets for the relatively large 1947 production.” The release went on to say that an announcement would soon be made inviting packers to bid on a *portion* of the quantity (Pl. Ex. 4). Its tentative nature is further manifested by the fact that the program as ultimately conceived called for the purchase of 285,000 tons of fruit, rather than the 133,000 tons mentioned in the initial press release.

This Court must be aware that programs of this description, based on incomplete data, and subject to unknown contingencies, are always being modified—to meet changing circumstances—including the change in viewpoint of policy making officials; and that such changes are such common practice that Rosenberg must be presumed to have executed its contracts with full knowledge of the possibility of change.

**CCC Officials Did Not Promise That the Announced Program
Would Not Be Modified**

Appellee is apparently aware of the inadequacy of the press release as a contractual commitment, for it couples with this contention a claim of “repeated in-

sistence by CCC officials that the program 'as announced' would not be changed" (Appellee's Brief, p. 43). In short, appellee contends that CCC converted a statement of policy into a contractual representation by expressly promising that the program would not be changed. This, if true, would present a stronger case for appellee. But appellee's assertion is not supported by any reference to the record, and distorts the facts.⁶ Later in its brief, appellee again refers to this matter (Brief, p. 46), and cites R. 173-177. This record reference does not support appellee's statement. *There was no representation by any Government official that the program would not be changed, and we challenge appellee to furnish proof of its allegation.* In our opening brief (p. 51), we pointed out that appellee's case rests on a telegram sent by Smith, a Department of Agriculture official, to Grady. Grady had suggested that the program be modified, and that prices be fixed under certain provisions of the Webb-Pomerene Act. Smith replied that Grady's proposal ran counter to the announced program, and that he solicited and expected the packers' co-operation in making the program a success (Pl. Ex. 8). This telegram was certainly not a warranty against change, and no reasonable man could so interpret it.

It should also be noted that Smith was not the contracting officer, and had no authority insofar as appears from the record to bind the Government to a

⁶ The appellee's brief contains a number of misstatements of fact; but in order to keep the reply brief within the limits allowed, we have confined our discussion to the more critical of the misstatements.

fixed program. Nor could he contract away the Government's right to change Governmental policy. *Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 811 (C. Cls.). Appellee's repeated allegations that CCC had represented that the program would not be changed cannot alter the facts, nor can wishful thinking convert a rejection of the Webb-Pomerene proposal into a promise not to buy more raisins.

A Promise to Keep a Price Support Program Rigid Should Not Be Implied When the Circumstances Explicitly Reject the Existence of Such a Promise

Before closing our brief discussion of this issue, appellant believes it worthwhile to quote from a recent law review comment on the instant case. (See 56 Col. L. R. 282, 285.):⁷

⁷ Appellee continuously refers to the fact that the Secretary of Agriculture refused to cancel the contracts and to the fact that Rosenberg offered to cancel all its grower contracts. These matters do not bear upon the legal issues. The present action is not based upon any legal right flowing from this refusal to cancel or renegotiate, and appellee's repeated references may be intended to prompt an emotional reaction, rather than to direct the Court's attention to the genuine issues. Appellant has, therefore, not dwelt on these matters. However, no matter how irrelevant, the facts should be objectively and correctly stated.

It is true that the Secretary refused to cancel the contracts. He did this on the advice of counsel that he could not legally do so (R. 403-404). It is also true that Rosenberg offered to cancel its grower contracts. But at the time of its offer, Rosenberg had fixed price contracts for a total of only 156 tons of raisins (Pl. Ex. 46).

Appellee also describes as "shocking" CCC's acceptance of the second of Rosenberg's offers the same day that it announced the additional purchases. While it is true that CCC so accepted appellee's second offer, appellee neglects to point out the highly pertinent surrounding circumstances. The change in program was a matter of grave concern and of considerable dispute. Senator

Although the scope of immunity for subsequent interference may be limited by the element of bad faith, the instant court seems to have erred in finding that a change in program from that projected in the press announcement was an unconscionable position. In inferring that the press release and its encompassed program was the basis for the understanding between the parties the court overlooks the statutory mandate of the Commodity Credit Corporation Charter Act [62 Stat. 1070 (1948), as amended 15 U.S.C. §§ 714-714(o) (1952)] and the purposes served by the dissemina-

Downey had been diligent and persistent in his efforts to persuade the Government to modify its program. The growers themselves had been in a state of protracted turbulence and were highly vocal. About October 9, buying being at a standstill, CCC decided to enter the market. This decision was not secret nor arrived at out of any malice to the packers (R. 146). It was so generally known, that the Fresno papers carried an account of the pending decision in its papers on October 10 and 12 (Def. Exs. P, Q, id.). And as Senator Downey, appellee's witness testified, Rosenberg must have known about this decision (R. 140). Rosenberg then had a few days to withdraw its offer, but did not do so.

Appellee, recognizing that the newspaper accounts undermine its pretension that it was caught unaware by the October 14 announcement, seems to minimize them by characterizing them as "reports of rumors of unsuccessful efforts to effect a change." But the facts do not support this characterization. This Court will note that the newspaper accounts are based on Senator Downey's public statements. On October 10 he urged the growers not to sell because he was confident that the Government "will develop a purchase program which will save the growers from suffering an unwarranted loss." On October 12, Senator Downey stated that the Secretary of Agriculture would announce not later than Tuesday (October 14) "additional programs for the support of dried fruit sales, particularly raisins and prunes." He then urged the growers not to sell until after the announcement was made. The announcement was in fact made on Tuesday, October 14, and Rosenberg is hardly in a position to cry "Surprise."

tion of information by a federal agency. It is highly unlikely that the CCC intended to set forth limitations on its ability to cope with unexpected market developments in either a press announcement [Cf. *RFC v. MacArthur Mining Co.*, 184 F. 2d 913 (8th Cir. 1950), cert. *denied*, 340 U.S. 943 (1951)] or negotiations with a private contractor. Since the statutory objectives may require immediate response to changed conditions irrespective of existing commitments, it appears unwarranted to impose, from a present statement of intended future conduct, an obligation to refrain from change or, secondarily, to make compensation for loss caused by such change. Although it may be desirable to renegotiate contracts in these circumstances in order to augment future cooperation with announced programs, that decision is best left for the agency to determine in the light of its existing commitments and future policy. [Cf. 37 Ops. Att'y Gen. 253 (1933); 28 Ops. Att'y Gen. 121 (1909)].

III.

THE ISSUE OF WAIVER

The Performance of An Executory Contract After Breach Waives the Breach, When the Performance, Not the Breach, Caused the Loss Complained of

In response to appellant's first contention that appellee waived the breach since the contract was entirely executory, and that appellee's performance, not the breach, caused the damage complained of, appellee contends (Brief, p. 59) that appellant "misrepresented" the facts by claiming that Rosenberg did not buy raisins until after the alleged breach had occurred. However, the facts, allegedly misrepresented, are in actuality fully supported by the opinion of the District

Court and by the record. (See R. 63-64, R. 294-302, 317-319, Def. Ex. V, W; see also our opening brief, pp. 61-62).

Appellee also cites legal authority for the proposition that in the event of breach, the injured party has the election either to rescind, sue at once, or to continue performance. This is true where the *breach* causes actual damage. In such instances the injured party is given the election mentioned. But here, the Government's asserted breach did not cause any damage since the contract was entirely executory. The damage did not occur until Rosenberg purchased the raisins—following the alleged breach—and hence it was appellee's action, not the breach, which caused the financial loss. Appellee could have avoided all loss by not entering the market. In these circumstances, recovery is not permitted, as the appellant's authorities establish (see our opening brief at 63-65).⁸

Rosenberg Waived the Breach by Accepting CCC's Offer to Renew the Contract at the Contract Price

The appellant further urged waiver on the ground that the contracts had been reinstated by CCC upon the express understanding that delivery would be at the contract price. Appellee argues, in reply, that the agreement related only to shipment, and not to price.

⁸ The instant case was also the subject of comment in the Texas Law Review (Vol. 34, pp. 315-317). The reviewer noted that Rosenberg "was aware of the so-called hindrance when he elected to continue performance, and knew that performance would result in increased cost. He might have been excused if he had ceased performance after the second CCC program was put into operation, but he should not be allowed to recover damages which were avoidable," citing cases.

(Brief, p. 62.) The dispositive answer is found in the correspondence involved (See our opening brief, pp. 68-72). Appellee ignores the fact that CCC's offer to accept the raisins at a late date was contingent upon delivery "at the contract prices"; that the offer further stipulated that the "prices would not be raised", and the further fact that Rosenberg was told that shipping instructions could not be issued if Rosenberg were to assert any claim for higher prices. (See our opening brief, pp. 60-70).

Appellee further argues that if "CCC intended to extract the waiver of Rosenberg's claim for damages, it should have so stated." (Brief, p. 64). By the same token, if Rosenberg was not willing to deliver at the contract price as specifically provided in the offer, why did not Rosenberg say so? The issue has to be decided by what the parties did say rather than by what they did not say.

The correspondence makes it clear that Rosenberg accepted the offer to reinstate the contracts knowing that the contracting officer intended to pay no more than the contract price. This unquestionably constituted a waiver.

IV.

THE ISSUE OF DAMAGE

Appellee Has Not Established That Rosenberg Could Have Purchased Raisins at \$110 Per Ton, Absent the Alleged Breach

In answer to the Government's contention that there is insufficient evidence to establish the price at which raisins would have sold had there been no program modifications, appellee offers the testimony of Mr.

Grady who speculated that the price would have dropped to \$110. Appellee then states that the Government offered “not one scintilla of evidence in the record to contradict Grady’s expert opinion.” (Brief, p. 68). This statement is not supported by the record. The evidence in rebuttal is noted in our opening brief, pp. 76-79, and need not be repeated here.

Appellee further states (Brief, p. 68), “The appellant’s marketing expert S. R. Smith, heard Grady’s testimony but did not contradict his analysis of the raisin market. Smith himself, testified that the market did reach a level of \$110 in late October” (R. 50). This is a strange argument coming from appellee. If the market declined to a level of \$110 to \$115 in *late October*, as Smith testified, and as appellee now argues to be the fact, what happens to appellee’s claim that the modification on October 14, 1947 increased the price of raisins?⁹

Appellee further argues that proof of the October price of \$110 is established by the fact that Rosenberg bought “some raisins” at that price. The fact is that despite Rosenberg’s heavy commercial commitments, and despite its contract to deliver 14,000 tons of raisins to CCC, Rosenberg only purchased by fixed

⁹ Appellee regards the announcement of November 26, as a further breach of contract. Strangely enough, Rosenberg offered to sell 2,000 tons of raisins on November 18, 1947, and CCC accepted the offer on November 26 (Def. Ex. AA), *the date of the policy change*. If the announcement had had the effect of raising prices, as appellee contends, why did not appellee sue for breach of this third contract? We think it reasonable to assume that Rosenberg did not claim damages because the November 26 announcement, in reality, had no effect on the market price. (See Appendix C, Appellant’s Op. Br.).

price contracts the following tonnage in the periods indicated (Pl. Ex. 46):

<i>Period Ending</i>		<i>Amount</i>
10- 6-47		151 lbs.
10-14-47	app.	135 tons
10-20-47	app.	32 tons
10-27-47	app.	3 tons
Total app,		<hr/> 171 tons

If Rosenberg was able only to buy this trifling amount (the average cost was \$112), it seems evident that the prevailing price must have been much higher.

Appellee also argues that the bids submitted reflected a grower price of \$110. This is not accurate. The bids were submitted in the expectation that when the open contracts were closed, they would be closed at a price which would furnish a profit or at least prevent financial loss. They did not reflect existing market prices. Rosenberg bid *below the market price* in order to get the business.¹⁰

¹⁰ Appellee claims that the Government's statement that Rosenberg's bid was made below the market price (Brief, p. 50) is not true. The truth of the statement is not only borne out by the market reports (See our opening brief, p. 80, footnote 51), but also by the testimony of Mr. Arnold who at the time of the action involved was a vice-president of Rosenberg. He testified that Rosenberg bid below the market because the company officials believed that this would be necessary in order to compete successfully against the co-operative (R. 586). Appellee's counsel have referred to Mr. Arnold as a disgruntled ex-employee, thus seeking to impugn his credibility. But the fact is that far from being a disgruntled ex-employee, Mr. Arnold has become president of Rosenberg (see Poor's Register of Directors & Executives, 1956 ed., p. 978). Appellee also takes umbrage at appellant's statement that

In contesting appellant's argument that the price would not have dropped to the \$110 level because of the strong grower resistance to such offers, appellee alleges that grower resistance did not result in higher prices and appellee intimates that the District Court so found. (Brief, p. 72). As a matter of fact, the District Court stated that (R. 54):

Because of the uncertain condition of the market and grower resistance to low prices, plaintiff was unable to acquire raisins in large quantities in the latter part of September and the early part of October.

And at R. 57 the Court said:

Grower resistance to the buying program developed in September and continued through October.

It seems therefore, that the court was cognizant of the impact of grower resistance on the price structure, and of its effect on Rosenberg's purchases.

**Appellant Has Not Established the Price Paid for the Raisins
Delivered to CCC**

With respect to the next issue—as to what Rosenberg actually paid for the raisins furnished the Government—appellee argues (Brief, p. 74) that the evidence shows possession by Rosenberg of sufficient raisins to fill the Government contracts on or before January 27, and states that the record (R. 625-626) shows that a Government witness “reluctantly admitted that * * *

the action of Rosenberg, through the use of open contracts, resulted in depressing the market price, but this was the testimony of the same Mr. Arnold (see R. 587-588).

Rosenberg had already covered its CCC commitment at that price'' (of \$133.60). The truth of it is that the contracting officer was testifying from notes made several years prior to his testimony—notes which contained the figure \$133.60, and in trying to recall what these figures referred to he stated that his memory was not clear. However, at the insistence of appellee's counsel, he speculated as to their meaning, and stated that he thought Grady had told him that Rosenberg "had either covered or would have to cover at that figure'' (R. 625). In any event, the contracting officer's recollection of what Grady said is not proof of the fact. The same observation holds true with respect to appellee's contention (Brief, p. 75) that the price was verified by Grady's letter to Senator Downey that Rosenberg would lose \$315,000 on the deal. This is not proof of price.

Appellee also argues that it had purchased the raisins for CCC commencing in October, and requests the Court, in determining cost, to apply the first in-first-out rule. The fact is that Rosenberg refused to make delivery until January, contending that it had no raisins to deliver to the Government; hence any formula of first in-first out is without support in the record. Although we do not regard the opinion or findings of the District Court to be invulnerable, on this one issue its conclusion is backed up by documentary proof, and should not be disturbed (see this brief, pp. 14-15).

CONCLUSION

This case is of great importance. The appellee has a large financial stake in the outcome. The appellant,

if the decision of the District Court is upheld, may be faced with tremendous liabilities, for Government economic programs are constantly being changed—cancelled—augmented—and we have no doubt that in many instances the revisions have not redounded to the financial benefit of everyone concerned.

Cutting to the heart of the principal issue in the case—that of implied contract—appellant submits that in determining the existence of an implied contract, this Court is not required to adopt irrational conclusions. Appellant further submits that it would be highly unreasonable to conclude from the mere announcement of a Government stabilization program that the Government, by implication, had agreed to abandon its sovereign prerogative of changing that program if the state of the economy so required.

Since the Government may not contract away its right to exercise its sovereign powers, the Government should not be found to have agreed to respond in damages for such action in the absence of clear proof of an intent to assume such an unusual liability.

WHEREFORE, appellant submits that the judgment of the District Court should be reversed, with costs to appellant.

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No. 14,844

In the

United States Court of Appeals

For the Ninth Circuit

COMMODITY CREDIT CORPORATION,
Appellant,

VS.

ROSENBERG BROS. & Co. INC., a Corporation,
Appellee,

and

ROSENBERG BROS. & Co. INC., a Corporation,
Appellant,

VS.

COMMODITY CREDIT CORPORATION,
Appellee.

Petition for Rehearing

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APR - 5 1957

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No. 14,884

In the
United States Court of Appeals
For the Ninth Circuit

COMMODITY CREDIT CORPORATION,
Appellant,

VS.

ROSENBERG BROS. & CO. INC., a Corporation,
Appellee,

and

ROSENBERG BROS. & CO. INC., a Corporation,
Appellant,

VS.

COMMODITY CREDIT CORPORATION,
Appellee.

Petition for Rehearing

*To the Honorable Court of Appeals for the Ninth Circuit
and to the Judges thereof:*

Rosenberg Bros. & Co. Inc., appellee in the above entitled case (hereinafter referred to as "Rosenberg") respectfully petitions this Honorable Court and the Judges thereof for:

(1) a rehearing in bank of the appeal and cross-appeal from the decision and judgment of the United States Dis-

trict Court made and entered in the above entitled case on May 31, 1955;

OR IN THE ALTERNATIVE

(2) a rehearing before the Honorable Judges of the Court of Appeals for the Ninth Circuit who, on March 17, 1957, rendered the decision and judgment on the appeal and cross-appeal herein, reversing the said United States District Court.

Rosenberg's petition is based upon the following grounds:

I. Throughout Its Opinion the Court Disregarded the Findings of the Trial Court.

As if in complete distrust of the trial court, the Court of Appeals brushed aside and disregarded all the findings of the United States District Court on disputed issues and, in effect, redecided these issues in favor of Appellant. The Court of Appeals acted in this manner despite the presence of ample evidence in the record to support the findings of the United States District Court, and despite the accepted rule of law that great weight should be given to the findings of the trial court, which are presumably correct, and that an appellate court should not ignore these findings, particularly because it is not in a position to judge the credibility of witnesses.

Fed. Rules of Civ. Proced., Rule 52(a) ;

Walling v. General Industries Co. (1947) 330 U. S. 545, 91 L.Ed. 1088;

Graver Tank & Mfg. Co. v. Linde Air Products Co. (1949) 336 U. S. 271, 93 L.Ed. 672; *aff'd*. 339 U. S. 605, 94 L.Ed. 1097.

It was the trial judge who, in evaluating the testimony of witnesses, had the opportunity to observe and who could and did weigh the apparent malice of the then Secretary of

Agriculture towards Rosenberg and other packers, evidenced by his expressed intent to "teach the packers a lesson" and that the packers "could not buck a four billion dollar corporation" (R. 243-244; 306-309; 447*); the evident fairness of the attitude of S. R. Smith, the Government official in charge of the Fruit and Vegetable Branch, who recommended renegotiation of the packer contracts (Pl. Ex. 50); and the obvious sincerity and thorough understanding of the raisin industry and its problems exhibited by Rosenberg's witness, Dwight Grady.

Why in this case should the established rule of law re acceptance of findings of fact by an appellate court be so completely disregarded? Counsel for petitioner can only conclude that it was the inadequacy of their presentation, written and oral, which permitted this situation to arise. If this is indeed the case, in fairness to petitioner, a rehearing is clearly indicated.

II. The Court Misconstrued Rosenberg's Argument and Erred in Ignoring the Finding of the United States District Court That Rosenberg Had Not "Assumed the Risk" of a Change in Commodity Credit Corporation's Program as Announced September 5, 1947.

In discussing the Secretary's September 5 announcement the Court characterizes Rosenberg's claim as one that the announcement "became part of the contract" (Opinion, p. 4) and that Commodity Credit Corporation (hereinafter referred to as CCC) "agreed not to purchase more than 61,000 tons of raisins during its entire program and moreover that the purchases would be made from processors and packers" (Opinion, p. 6). Rosenberg did make this argument, but only in connection with its first cause of action.

*Reference to the printed record will be made in this manner throughout the petition.

This line of argument was not accepted by the United States District Court; but it decided the case in favor of Rosenberg on the basis of Rosenberg's second cause of action, which was grounded on CCC's *implied* promise not to hinder or prevent Rosenberg's performance. This implied promise does not depend on a theory that the September 5 announcement is "part of the contract," or that CCC "agreed" not to purchase more than 61,000 tons and to purchase from processors and packers.

Professor Corbin has stated the governing legal principle:

"In any kind of contract, if the right of one party to compensation is conditioned upon the rendition of some service or other performance by him or on his behalf, it is *nearly always* a breach of contract for the other party to act so as to prevent or hinder and delay or to make more expensive the performance of the condition." (Italics added.) 3 Corbin on *Contracts* (1951 Ed.) § 571.

It is only upon proof of exceptional circumstances that the performing party is regarded as having "assumed the risk" of hindrance by the other party to the contract. *Restatement of Contracts*, § 315. The Secretary's September 5 announcement is important only because it bears upon the issue of whether Rosenberg "assumed the risk" of a change in CCC's 1947 raisin purchase program. A finding that Rosenberg did not assume that risk need not be based upon the ground either that the September 5 announcement was an "agreement" by CCC or a "part of the contract." Even if the September 5 announcement is neither an "agreement" nor a "part of the contract," and even if it be regarded as a mere statement of policy, the words of that statement were clear and definite. These words, in the light of the conduct of CCC officials, firmly support the trial court's finding (Finding 44, R. 82) that Rosenberg *did not assume the risk* that its

performance would be hindered by a change in CCC's 1947 raisin program. This is obviously a question of *fact*. As such, the finding of the United States District Court is presumably correct and should not have been ignored by the Court of Appeals.

There is ample evidence in the record to sustain the finding of the United States District Court that Rosenberg did not "assume the risk" of a change in CCC's raisin program as announced September 5, 1947. The September 5 announcement was carefully prepared and was in definite and unequivocal words; it prescribed a definite "maximum" for raisin purchases; it unequivocally stated that CCC would purchase from processors and packers; it also clearly stated that prices would not be maintained "at any given level"; it was the "immediate" announcement of the raisin purchase program contemplated by Docket OC-95a; it was the *only* announcement of CCC's *entire* 1947 raisin purchase program; the tonnage on which calls for bids were issued under Announcements No. 1 and No. 2 exactly equalled the 61,000 ton maximum referred to in the September 5 announcement; contemporary announcements by CCC and Department of Agriculture officials recognized that CCC's raisin purchases had been made "under the program announced by the Department September 5, 1947" (Pl. Ex. 13) and summarized total purchases of dried fruit "since offers to purchase were originally announced by the Department on September 5" (Pl. Ex. 19).

The finding of the United States District Court that Rosenberg did not assume the risk of a change in the program announced September 5 is further supported by statements of the official of the Department of Agriculture in charge of the raisin purchase program. S. R. Smith summarily rejected Rosenberg's requests for change in the pro-

gram as “contrary to the Secretary’s statement,” declared that the “program as announced” was a substantial contribution to stabilize conditions in the dried fruit industry, and solicited the cooperation of Rosenberg and other packers in making it a success (Pl. Ex. 8).

That the Court of Appeals misconstrued the significance of the September 5 announcement is evidenced in its very opening statement of the facts, which begins with the date of September 10, 1947, the day on which Commodity Credit Corporation, hereinafter referred to as “CCC” issued its first invitation to bid on a part of the maximum total of raisins covered by the Secretary’s September 5 announcement. The Court of Appeals makes no reference to the September 5 announcement until a point much later in its opinion when its discussion is more of an explanation why it chose to ignore the announcement. This treatment of the September 5 announcement is completely unwarranted in view of the fact that the Secretary not only released the announcement to the press but sent copies to the industry, including Rosenberg (Finding 10, R. 69-70); that both the Secretary and CCC intended packers and processors to rely on the announcement and that Rosenberg did rely on it (Finding 13, R. 70-71; Findings 18-19, R. 72-73).

III. The Court Misapprehended the Facts and Made an Error of Law When It Ruled That Rosenberg Had No Election to Acquire Raisins for Its CCC Contracts After CCC's Breach of Contract on October 14, 1947.

The Court’s opinion, relying on the rule of mitigation of damages, states that Rosenberg cannot recover from CCC because Rosenberg’s damages (resulting from its acquisition of raisins for its CCC contracts after CCC’s breach) were a consequence of Rosenberg’s active and unreasonable enhancement of its damages (Opinion, pp. 7-13). This appli-

cation of the rule of mitigation of damages is based on a misapprehension of fact and is an error of law.

A. THE COURT MISAPPREHENDED THE FACTS WHEN IT STATED THAT ROSENBERG WOULD HAVE SUFFERED NO DAMAGE HAD IT BOUGHT NO RAISINS FOR ITS CCC CONTRACTS AFTER CCC'S BREACH.

Had Rosenberg withdrawn from CCC's 1947 purchase program by refusing to deliver after CCC's breach and by not purchasing raisins from growers to fulfill its CCC contracts, the consequences would have been more disastrous than they were. Rosenberg's ability to obtain raisins from growers for its business depends upon the growers' well-being and upon a continuing relationship with growers. Rosenberg could not withdraw from the market in one year and expect to maintain its grower relationships. The continuance of good grower relationships required its participation in CCC's 1947 raisin purchase program. Had Rosenberg not bid on CCC's calls, or had Rosenberg not purchased raisins for its CCC contracts, growers who customarily deal with Rosenberg would have been caught with a large raisin surplus in their hands, or would have been forced to seek other outlets for their 1947 crop. This would seriously have prejudiced Rosenberg's supply position *vis-a-vis* its growers in future crop years. A consequential and equally serious effect of Rosenberg's complete withdrawal from its CCC contracts in mid October would have been complete demoralization of the raisin market. Rosenberg's participation in CCC's 1947 raisin program was necessary to assure its growers of a return on their raisins, and in turn to protect Rosenberg's large investment in dried fruit facilities. Rosenberg was too big a factor in the industry, and its CCC commitment was too large to allow it to "walk away" from its CCC contracts as the Court suggests, without disastrous consequences (R. 199-200; 208).

B. THE COURT MADE AN ERROR OF LAW IN APPLYING THE PRINCIPLE OF MITIGATION OF DAMAGES TO THE FACTS OF THIS CASE.

CCC's breach of its contract with Rosenberg gave Rosenberg an election of remedies: (1) to rescind; (2) to treat the contract as broken and sue at once for damages; or (3) to treat the contract as binding, continue performance, and sue for damages for breach. An innocent party to a contract *may* stop his performance upon breach by the other party, but he is not *required* to do so. He may continue to perform, insofar as he is permitted, and then claim damages for the breach of contract.

Winans v. Sierra Lumber Co. (1884) 66 Cal. 61, 4 Pac. 952;

Bu-Vi-Bar Petroleum Corp. v. Krow (C.C.A. 10, 1930) 40 F.2d 488, 490;

2 *Fed. Law of Contracts*, § 429;

5 *Corbin on Contracts* (1951 Ed.) § 1105, p. 469.

The decision of the Court of Appeals, rendered on March 7, 1957, requires the injured party to a contract, at its peril, to decide whether the wrongdoer's breach is so substantial as to allow it to rescind, or whether it is so insubstantial as not to excuse performance, but merely to give rise to a claim for damages. The law is not so harsh. The rule of mitigation of damages, which requires the innocent party to cease performance upon breach by the other party to a contract, applies only in case the other party *repudiates* the contract or breaches the contract in a manner tantamount to a *repudiation*. It has no application to the facts of the subject case, where CCC not only failed to repudiate its contract with Rosenberg but, indeed, *insisted on performance* after its breach. The rule is aptly stated by the Court in *Bu-Vi-Bar Petroleum Corp. v. Krow*, *supra* at page 492:

“The situation of an injured party, where there has been a breach which does not indicate an intention to repudiate the remainder of the contract, and the situation of the injured party where there has been a total renunciation of the contract, differs in important particulars. In the former case, the injured party has a continuing election either of continuing performance or ceasing to perform. * * * Any act indicating an intent to continue will operate as a conclusive election. * * * On the other hand, where the contract is wholly renounced, there can be no real election between continuation and cessation of performance * * * because, after notice of renunciation the other party cannot go on and complete an executory contract and sue for any increased damages resulting from his continuing to perform”.

Accord: Williston, *Contracts* (Rev. Ed.) § 1298.

The Court of Appeals correctly states the legal principle which prevents an injured party from continuing performance and increasing its damage where the other party *renounces* or *repudiates* a contract (Opinion, pp. 10-12). It errs, however, in applying this principle to the facts of the subject case. CCC at no time renounced or repudiated its contract with Rosenberg. At all times it *repeatedly* and *continuously* insisted on Rosenberg's performance. The United States District Court so found (Finding 38, R. 79-80). CCC's insistence on performance with knowledge of Rosenberg's short position (Finding 21, R. 73; Finding 37, R. 79), indeed, was insistence that Rosenberg purchased the raisins for its CCC contracts.

Although the Court cites the *Zimmerman* case as one not involving anticipatory repudiation (Opinion p. 12), closer examination of the facts of the *Zimmerman* case discloses that the wrongdoer did *repudiate* its contract by refusing all future deliveries under a contract calling for deliveries over

a period of time. *Capitol Paper Box Inc. v. Belding Hosiery Mills Inc.*, 350 Ill. App. 68, 111 N.E. 2d 858 (Opinion, p. 13) is not a case involving *performance* after repudiation. It considers a claim for damages based on lost profits on the *unperformed* portion of a contract broken by one party's deliberate insistence on the use of new materials for paper boxes, not specified in the contract and so expensive that the manufacturer would have lost money. The court's discussion of the principle here in issue clearly mentions *repudiation* of contract by the wrongdoer. Moreover, the deliberate insistence on materials far superior to those specified was tantamount to *repudiation* since both parties knew performance with such materials was economically impossible. The *Bear Cat Mining Co.* case (Opinion, p. 13) is merely a general illustration of the doctrine requiring the innocent party to avoid enhancement of damages after *repudiation* by the other party and does not involve continued performance of a contract after a breach *not* tantamount to repudiation.

The fraud cases cited by the Court (Opinion, p. 12) illustrate an entirely different principle of law from that involved in the subject case. Performance of a contract with knowledge of *fraud in procurement*, which renders it unenforceable, is quite distinguishable from performance after a *breach* of contract not tantamount to repudiation.

IV. The Decision of This Court Is Based on a Misapplication of Law in That the Court Erred in Applying the Parol Evidence Rule to Avoid Implication of a Contract by CCC Not to Hinder Rosenberg's Performance or Render It More Expensive.

A. THE PAROL EVIDENCE RULE APPLIES WHEN THE "CONTRACT" HAS BEEN IDENTIFIED, BUT HAS NO APPLICATION IN DECIDING WHICH DOCUMENTS CONSTITUTE THE "CONTRACT."

The Court wrongly invoked the Parol Evidence Rule (Opinion, p. 5) as a ground for excluding consideration of the September 5 announcement. From the standpoint of

Rosenberg's first cause of action, based on an express contract, the true issue is *identification* of the contract: whether the September 5 announcement is a part of the contract, not whether it varies the meaning of an identified contract.

The contracts here in question are not single documents, easily identifiable, but consist of a series of communications, *viz.* the September 5 announcement of CCC's entire program (Pl. Ex. 4), announcements calling for bids on parts of the maximum quantity included within the September 5 announcement (Pl. Ex. 9, 14), mimeographed bid forms filed by Rosenberg in response to the foregoing, including PMA 100, a printed sheet of standard contract conditions (Pl. Ex. 10, 15), and CCC's telegraphic acceptances of Rosenberg's bids (Pl. Ex. 11, 12, 16). CCC's telegraphic acceptances of Rosenberg's mimeographed bids were merely final and formal assents and do not preclude the existence of a term of the "contract" in earlier documents, such as the September 5 announcement.

1 Corbin on *Contracts* (1950 Ed.) §§ 22, 31;

Ottney v. Finnie (1935) 5 C.A. 2d 356, 42 P.2d 714
(printed prospectus regarded as part of the contract).

Consideration of whether the September 5 announcement is one of the contract documents is not precluded by the Parol Evidence Rule, which applies only *after* identification of the contract documents.

B. THE PAROL EVIDENCE RULE HAS NO APPLICATION TO THE THEORY ON WHICH THE UNITED STATES DISTRICT COURT DECIDED THE SUBJECT CASE.

The United States District Court found for Rosenberg on the theory that CCC had violated its *implied* contract not to hinder or prevent Rosenberg's performance of its CCC contract (Rosenberg's second cause of action). The Parol

Evidence Rule is completely irrelevant to the existence of such an implied contract. *Generally, and in most situations* a contract not to hinder performance or render performance by the other party more expensive will be *implied as a matter of law* from the mere fact that a contract calling for performance by the other party has been executed. No additional evidence is required. The implication of such a contract is not regarded as a variation of the terms of the basic contract and is not a parol evidence problem.

3 Corbin on *Contracts* (1951 Ed.) § 571; 4 *Ibid.*, § 947.

The principle has been expressed in these words:

“In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other from carrying out the agreement on his part.”

Patterson v. Meyerhofer (1912) 97 N.E. 472, 204 N.Y. 96.

In the usual case, where the risk of hindrance is not “naturally and properly to be anticipated” hindrance is a breach of the implied contract. On the other hand, there must be affirmative proof that “under the terms of the contract or customs of the business” the action of the promissor is permissible in the rare situations in which there is no liability for breach of such an implied undertaking.

Williston, *Contracts* (Rev. Ed.) § 1293A.

Parol evidence may be a problem in the “rare” case but it is irrelevant to the “usual” situation which the trial court found here (Finding 44, R. 82).

V. This Court Committed Error When It Ignored the Findings of the United States District Court on the Issue of Waiver.

The United States District Court found that the exchange of telegrams and telephone calls between Rosenberg and

CCC in the period January 26-29, 1948 related merely to *delivery* arrangements, and that Rosenberg had neither expressly nor impliedly waived its rights to claim damages by such exchange (Finding 39, R. 80), or by its subsequent shipment of raisins to CCC, or by acceptance of the contract price for such shipment (Finding 41, R. 80-81).

Waiver is a matter of fact. *Federal Rules of Civ. Proced.*, Rule 8 (c); 4 *Cyc. Fed. Proced.* (2d Ed.) 643. There was substantial evidence to uphold the findings of the United States District Court that Rosenberg had not waived its rights to claim damages. The Court of Appeals should not have ignored these findings in its discussion of the issue of waiver (Opinion pp. 13-14). The appeal court's discussion of the legal principles of waiver presupposes facts other than those in the subject case. Both the *Early & Daniel Co.* case and the *Willard, Sutherland & Co.* case (cited on p. 14 of the Court's Opinion) involved delivery of quantities in excess of those specified in a contract and acceptance of payment at the contract price by the contractor making excessive delivery. Neither case was concerned with a claim for damages for *breach of contract*, but involved merely claims for additional payments which as a matter of fact had been waived. In the *Francis* case (Opinion p. 13), the court found that a contractor with the United States had no contractual right to cut wood inside a military reservation for delivery to the United States; and after making this statement, continued to express its opinion by way of *dictum* that even if the contractor had a contractual right to cut wood inside the military reservation, it had, as a matter of fact, waived this right by *acquiescing* in the orders of the military authorities to cut wood elsewhere and by delivering receipts in full and accepting payment. This brief discussion of the cited cases illustrates that in every one of them the

court found waiver *as a matter of fact*. In the subject case, the United States District Court found as a matter of fact that Rosenberg had neither expressly nor impliedly waived its right to claim damages (Findings 39, 41, R. 80-81).

The Court of Appeals ignored another finding of the United States District Court when it stated (Opinion p. 14):

“There was, in fact, no disputed claim on Rosenberg’s part, which was advanced by it or recognized by the Government, when Rosenberg performed the contract.”

Sharply contrasting with this observation is the fact found by the United States District Court (Finding 38, R. 79-80), that Rosenberg *continually* and *consistently* from and after October 14, 1947, pressed its claim for renegotiation of price to a level which would enable it to escape loss on its CCC contracts. Rosenberg’s claim originally took the form of a request for price renegotiation rather than for legal damages because it was being pressed at an administrative level rather than in the courts. This suit is the logical extension of CCC’s refusal of Rosenberg’s claim for price renegotiation, and is the *identical* claim originally made to CCC. CCC was well aware of Rosenberg’s claim at the time it accepted delivery under Rosenberg’s contracts. The Chief of the Fruit and Vegetable Branch had, prior to this time, reviewed the situation and recommended price renegotiation to the Secretary of Agriculture. In his summary of the facts (Pl. Ex. 50), he stated that claims for renegotiation of price had been received by CCC from 10 of the 13 contracting processors (including Rosenberg).

A further misapprehension of fact by the Court of Appeals is found in its statement (Opinion p. 14) that at the time of the January 1948 exchange between CCC’s contracting officer, Allmendinger, and Rosenberg’s representative, Grady, the Government “rejected” Rosenberg’s attempt

to reserve its right to assert a claim against CCC. Such was not the fact. Allmendinger lacked authority either to accept or reject Grady's proposed reservation of right. He was not concerned with compromise of Rosenberg's claim but only with *shipment*, and he told Grady that in so many words (R. 270, 617-618). Grady specifically told Allmendinger that he did not intend, by agreeing to ship, to waive Rosenberg's claim (R. 276-277). In the light of this evidence the Court of Appeals should not have overturned the finding of the United States District Court that Rosenberg had *not* waived its claim against CCC.

VI. The Court Erred in Holding That Rosenberg's Completion of Standard Payment Vouchers, Certifying That the Bills Presented Were Correct and Just, and Acceptance of the Contract Price After Performance, Amounted to a Waiver of Its Right to Claim a Further Sum.

A right of damages for breach of contract is not waived by accepting payment at the contract price and completion of a standard Government voucher stating that the bills presented are "correct and just". The money paid by CCC to Rosenberg after delivery of Rosenberg's raisins in 1947 was justly owing to Rosenberg, and the only issue before the court was whether or not CCC was liable to Rosenberg in an *additional* sum. There was no way in which Rosenberg could collect the sum admittedly due it without completing the standard payment vouchers. Under such circumstances, use of the vouchers does not constitute a waiver of Rosenberg's claim to an additional sum *Lundstrom v. United States* (D. Ore., 1941), 53 Fed. Supp. 709, 711, *aff'd.* (C.C.A. 9, 1943) 139 F.2d 792 is a Ninth Circuit case directly in point.

See also, *Blair v. United States* (C.C.A. 8, 1945), 147 F.2d 840, *mod. in other respects* (C.C.A. 8, 1945) 150 F.2d 676.

VII. The Court Is Under a Misapprehension of Fact as to the Time When Rosenberg Acquired Raisins to Meet Its CCC Commitments.

The Court states that Rosenberg decided to make delivery on its CCC contracts in January 1948, since the price of raisins had dropped, and "it would be enabled to purchase raisins at the lower prices, and fulfill its government contracts" (Opinion p. 3); and again, that Rosenberg "commenced" to purchase raisins to fulfill its CCC contracts only in the latter part of December 1947 (Opinion p. 8). It is a matter of undisputed and irrefutable fact that by January 1948, Rosenberg had already acquired all, or a substantial portion, of the raisins which it delivered to CCC. Considering only Rosenberg's *closed* contract acquisitions of 1947 crop raisins, there is undisputed evidence that from January 1948 until the *end* of the 1947 crop season, long after Rosenberg's CCC shipments were complete, Rosenberg acquired only approximately 3,500 tons of raisins. Even if it be assumed that the last raisins acquired under *closed* contract by Rosenberg in the 1947 crop season were acquired for its CCC contract (a contention which Petitioner strenuously opposes) it would be necessary to include closed contract acquisitions in the month of December 1947 to accumulate enough raisins to cover Rosenberg's CCC commitments (Pl. Ex. 48). The assumption that Rosenberg delivered the raisins last acquired in 1947 to CCC is patently false since Rosenberg was also supplying its other customers in this same period; and this fact necessarily pushes back even further the date on which Rosenberg acquired raisins for delivery to CCC.

It is also an undisputed fact that Rosenberg purchased raisins under *open* contracts as well as under closed contracts, and that its open contract commitments to take delivery of the raisins and its open contract right to posses-

sion of the raisins was just as firm and enforceable as its corresponding commitment and right under its closed contracts (Pl. Ex. 52).*

When Rosenberg's *open* contract acquisitions, as well as its closed contract acquisitions, are examined, it is even more obvious that Rosenberg did in fact acquire raisins for its CCC contracts long before January 1948. By November 25, 1947, Rosenberg had acquired several thousand tons *more* raisins than its total non-CCC sales to date, and by that date Rosenberg had acquired practically enough raisins to fill all of its non-CCC commitments for the *entire* 1947 crop year (Def. Ex. AC, Col. 10, 18). This undisputed record of acquisitions clearly demonstrates that Rosenberg was buying raisins in 1947 at a rate far greater than would have been warranted by its non-CCC sales alone. It was making provision both for its CCC commitments and for its other sales contracts as rapidly as it could under the then existing market conditions.

SUMMARY

For the foregoing reasons, and because of this Honorable Court's misapprehension of certain basic facts and misapplication of the law to the actual facts of the subject case, as found by the United States District Court, Petitioner prays that this Court grant a rehearing in bank, or in the

*Rosenberg's open price contract includes provisions identical with its closed price contract in the following words:

"This contract is intended and understood by both parties to pass title to said fruit, and to constitute an absolute sale. * * *

"Buyer shall have the right to the possession of any fruit sold as and when the same shall be dried and cured, and may at any time thereafter enter upon the premises where such fruit is, and remove the same * * *; but nothing herein contained shall affect Seller's obligation to deliver such fruit as herein provided."

alternative a rehearing before the Honorable Judges comprising the panel which reversed the decision of the United States District Court.

Respectfully submitted,

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No. 14886

**United States Court of Appeals
For the Ninth Circuit**

HENRY RAGONTON RABANG, *Appellant*,

vs.

JOHN P. BOYD, District Director, Immigration and
Naturalization Service, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

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No.

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United States Court of Appeals

For the Ninth Circuit

HENRY RAGONTON RABANG, *Appellant*,

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Appellee.

No.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

A. Statutory provisions believed to sustain jurisdiction.

Jurisdiction of the District Court was invoked under the following provisions:

(1) Title 28, United States Code, Section 2241, 62 Stat. 964, as amended, particularly as follows:

“(A) Writs of habeas corpus may be granted by . . . district courts . . . within their respective jurisdictions . . .”

(2) Title 28, United States Code, Section 2201, 62 Stat. 964, as amended, particularly as follows:

“In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any inter-

ested party seeking such declaration. . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

(3) Title 5, United States Code, Section 1009, 60 Stat. 237, as amended, particularly as follows:

“(a) Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

Jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under the following provisions:

(1) Title 28, United States Code, Section 2253, 62 Stat. 967, as amended, particularly as follows:

“In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had . . .”

(2) Title 28, United States Code, Section 1291, 62 Stat. 929, as amended, particularly as follows:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

B. Statute, the validity and interpretation of which is involved.

Petitioner was ordered deported pursuant to the provisions of former Title 8, U.S.C., Section 156(a), being the Act of February 18, 1931, c. 224, 46 Stat. 1171, as amended by the act of June 28, 1940, c. 439, Title II, Section 21, 54 Stat. 673, which provides:

“Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this act) who, after the enactment of this act, shall be convicted for violation of or conspiracy to violate any statute of the United States . . . taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, . . . shall be taken into custody and deported . . .”

C. Reference to pleadings showing existence of jurisdiction.

Appellant is held in the custody of appellee, within the jurisdiction of the district court (R. 4, 5, 8, 12).

Appellant has exhausted his administrative remedies, and is entitled to judicial review of his deportation proceedings (R. 7, 13, 14).

There exists an actual controversy between appellant and appellee within the jurisdiction of the district court (R. 4, 5, 12).

CONCISE STATEMENT OF THE CASE

Appellant was born a national of the United States in the Philippine Islands, and is a permanent resident of Seattle, King County, Washington, and he has resided continuously in the United States of America since January 24, 1930 (R. 5). Petitioner, at the time of coming to the United States as a national declared his intention of being a permanent resident of the United States, and petitioner has, at all times herein

involved, intended to become a United States citizen (R. 5, 55).

On or about March 21, 1951, petitioner was arrested pursuant to a warrant of deportation which charged that he was an "alien" found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to . . . The Act of February 18, 1931, as amended, in that, on or after June 28, 1940, he has been convicted of the violation of a law relating to traffic in narcotics . . . " (R. 49, 6).

A deportation hearing was held by the Immigration Service. (The record before the Service is Appended to the Return of Appellee. See: R. 16-60.)

At this hearing appellant was the sole witness, at which time he answered, as follows, with reference to his citizenship:

"Q When and where were you born?

A I was born in the Islands, in the Philippine Islands, on April 23, 1910.

Q Of what country are you now a citizen?

A Well, I am an American because I was born under the American flag.

Q Did you ever acquire United States citizenship?

A Well, no, sir, because I know I am an American, you know."

* * * *

"Q You claim you are an American because you were born in the Philippine Islands then?

A Yes, sir.

Q You never acquired United States citizenship through any other method that you know of?

A No, sir.” (R. 33)

Appellant admitted that he had been convicted of a charge involving narcotics and he was sentenced to six months in jail, which sentence was suspended, and he was placed on three years’ probation (R. 58). Appellant lived up to the terms of his probation and was duly discharged therefrom (R. 6, 7).

Petitioner exhausted his administrative remedies, including an appeal to the Board of Immigration appeals, and thereafter sought judicial review of said order, including an appeal to this court. That said appeal was dismissed through lack of prosecution because petitioner was without funds, and because it was believed by petitioner, and by the local Immigration and Naturalization Service, that appellant’s case would be determined by the appeals in the cases of *Mangoang v. Boyd*, *Gonzales v. Boyd*, and other cases pending before the above-entitled court, and involving the status of Filipinos residing in the United States, and who came to the United States prior to the Philippine Independence Act of 1934 (48 Stat. 462) (R. 7).

The Immigration and Naturalization Service itself moved to dismiss the order of deportation (R. 21) based upon the decisions in said cases, but the Board of Immigration Appeals refused to dismiss, and maintained that appellant was an alien, and that “entry” was not a precondition to deportation (R. 17).

Appellant, on May 25, 1955, filed a petition for Writ of Habeas Corpus, show cause, and Declaratory Judg-

ment with the United States District Court, Western District of Washington, Northern Division (R. 4-10), in which he alleged that he is a national of the United States, and not an alien (R. 8), that said conviction was not a conviction after "entry" as is required by the immigration laws, and that a deportation of appellant would deprive him of due process of law under the 5th Amendment of the United States Constitution (R. 8).

An order to show cause was issued by the Honorable William J. Lindberg, District Judge (R. 11).

Appellee filed his return (R. 12), and the record of administrative proceedings as a part thereof (R. 16), and in substance, admitted the factual allegations, and denied the legal issues presented by appellant.

Upon hearing, no oral testimony was taken. Briefs were submitted (R. 61, and R. 65-96).

Thereafter, on July 29, 1955, the court signed Findings of Fact and Conclusions of Law (R. 98), and entered an Order dismissing the application for habeas corpus and other relief (R. 101). The court found as a fact "That Petitioner is a native of the Philippine Islands, an alien who has never been naturalized nor has otherwise become a citizen of the United States" (R. 98).

Notice of appeal, and cost bond, were filed on August 19, 1955.

SPECIFICATION OF ERRORS

(1) The district court erred in concluding that appellant is now an alien.

(2) The district court erred in concluding that the power of deportation is not based upon the power to exclude, and that one who did not "enter" the United States, but came here as a National, can lawfully be deported.

(3) The district court erred in concluding that a United States National can be divested of such nationality in the absence of a voluntary act on the part of the individual to shed such nationality, and *a fortiori* the executive or judiciary may not infer the loss of nationality of a resident of the United States solely from the fact that independence is granted to those residing in the territory in which the national was born.

SUMMARY OF ARGUMENT

The power to deport is implied from, and depends upon, the power to exclude: a condition precedent to entry is extended as a condition subsequent to entry. *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.ed. 586. Appellant never entered the United States (he was not excludable): *Del Guerico v. Gabot* (C.A. 9, 1947) 161 F.(2d) 559; *Toyota v. United States*, 268 U.S. 402; *Gonzales v. Williams*, 192 U.S. 1; *Barber v. Gonzales*, 347 U.S. 637. He can not, therefore, be deported.

Expatriation is primarily a matter of intent. Appellant was born a national of the United States and came to this country as a matter of right: *Toyota v.*

United States (1925) 268 U.S. 402, 45 S.Ct. 563, 69 L.ed. 1016. This status is important, and superior to property rights; coupled with appellant's change of position (coming to the United States for permanent residence) acting upon that status, Congress is without power to deprive appellant of that status, and the reasoning in *Cabebe v. Acheson* (C.A. 9, 1950) 183 F.(2d) 795, should be reconsidered, particularly in view of the fact that the United States Supreme Court in *Barber v. Gonzales*, 347 U.S. 637, 98 L.ed. 1009, 74 S.Ct. 822, specifically saved that issue, and did not approve prior pronouncements of this court that persons of Filipinos origin who came here prior to the Philippine Independence Act of 1934, and have resided here continuously thereafter are now aliens.

ARGUMENT

Point I. Appellant Is Not Now an Alien, But He Is a National of the United States.

The District Court has concluded that appellant is now an alien. The undisputed facts are: Appellant was born a national of the United States in the Philippine Islands on April 23, 1910 (R. 33). He came to the United States for permanent residence on January 24, 1930. He has never left the United States since that time, and he has at all times considered himself an "American," and has, at all times since his arrival, intended to become a United States citizen.

Appellant's present alleged alienage is based solely on executive and judicial inference based on the Treaty of Independence, 61 Stat. 1174, and Presidential Proclamation No. 2695, 11 F.R. 7517, providing for the po-

litical independence of the Philippine Islands, but being silent as to the status of Filipinos who were permanent residents in the United States prior to 1934: see *Cabebe v. Acheson* (C.A. 9, 1950) 183 F.(2d) 794, 801.

Solely on those facts it is urged by appellee that appellant is now an alien as a matter of law.

Prior to the Treaty of Independence of 1946, 61 Stat. 1174, appellant was not an alien, but was a national of the United States: *Toyota v. United States* (1925) 268 U.S. 402; *Gonzales v. Williams* (1904) 192 U.S. 1; *Barber v. Gonzales*, 347 U.S. 637.

In *Barber v. Gonzales*, 347 U.S. 637 (*supra*), the effect of the court's decision was to bar the deportation of virtually all Philippine residents of the United States who came to the United States prior to 1934, on the ground that they had not made an "entry" into the United States by virtue of their nationality. In that case, Gonzales also argued that he was not an "alien," and the Supreme Court specifically did not approve the decision of the above-entitled court, which had ruled that Gonzales was then an "alien," and stated: "Our disposition of the case makes it unnecessary to consider these contentions" (Note 4).

In view of the fact that the Supreme Court did not approve the dicta of the above-entitled court, it is submitted that this court should examine the issue anew.

A.

The contention is that by virtue of the United States-Philippine Independence Treaty and the Presidential

Proclamation of July, 1946 (*supra*), the appellant was divested of his nationality and thereupon cloaked with alienage. Such conclusion has never been decided by the Supreme Court. It presently rests upon the rationale of the court below in the case of *Cabebe v. Acheson*, 183 F.(2d) 795, wherein it was declared:

“ * * * the Philippine Islands came to the United States by cession. And, by such acquisition many individuals became nationals of the United States. Later, the United States relinquished sovereignty over them and their country. It follows that Filipino nationals of the United States inhabiting the Island at the date of such relinquishment lost the status of nationality. The narrower question follows: Does such loss also occur as to Filipino-nationals of the United States domiciled in the United States? * * * ” (p. 880)

“ * * * The status of United States nationality for Filipinos was the direct result of the United States’ assumption of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status.

“The United States had it desired it, could have provided that Filipinos permanently residing in the United States would not lose their United States nationality upon the recognition of Philippine independence * * *.

“The question is not directly answered (but, as we think, it was inferentially answered) * * *. (p. 801)

“ * * * It is our conclusion that the United States government intended the status of Filipinos, regardless of domicile or place of residence at the date of Philippine independence, to be en-

tirely separate from any phase of adherence to the United States." (p. 802)

The power of the United States as a sovereign nation to cede, dispose of or otherwise relinquish its sovereignty, *nolens volens*, over parts of its territory, *together with the inhabitants residing therein subject to American sovereignty*, is not here challenged. Presuming this to be an incident of sovereignty, *Jones v. United States*, 137 U.S. 702; *DeLima v. Bidwell*, 182 U.S. 1, it becomes an entirely different proposition to assert as an incident of sovereignty the right to expatriate or divest of nationality, *nolens volens* (and expel from this country) nationals of the United States residing outside the ceded territory and within the jurisdiction of the United States at the time of cession, because of birth within said territory.

It is appellant's contention that the rights of nationals so situated are no different than would be those of United States citizens.

B.

United States citizens cannot be divested of their nationality except through expatriation. The fundamental basis for expatriation is that there must be a voluntary act on the part of the individual to shed his nationality. In *Perkins v. Elg*, 307 U.S. 325, 334, the court said:

"Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." To the same effect, see *Savorgnan v. United States*, 338 U.S. 491, 497, 498; *MacKenzie v. Hare*, 239 U.S. 299.

That Congress cannot by fiat declare a loss of nationality has been held by this Court on many occasions. In discussing that proposition the Court said in *United States v. Wong Kim Ark*, 169 U.S. 649, 703:

“The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. ‘A naturalized citizen,’ said Chief Justice Marshall, ‘becomes a member of the society possessing all the rights of a native citizen and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, * * *. Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of congress, *a fortiori* no act or omission of congress, * * * can affect citizenship acquired as a birthright, by virtue of the constitution itself, without any aid of legislation. The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.”

C.

It is undisputed that appellant never voluntarily renounced or abandoned his United States nationality or committed any act inconsistent with the rights or obligations of such nationality. It is urged by the govern-

ment, however, that appellant and all other persons of Filipino birth residing in this country prior to 1934, automatically lost their nationality by the treaty establishing the independence of the Philippine Islands.

If nationality is analogous to, and cloaked with the same protection that is accorded citizenship, then clearly appellant could no more be divested of his nationality by that treaty, *residing as he did in this country*, than if he were a citizen. For the Philippine Independence Act of 1934 and the Treaty constituted no voluntary act of renunciation or self-expatriation on the part of appellant. He did not vote on the ratification of the Independence Act of 1934; nor could he have voted thereon so long as he elected to remain within this country.

Is nationality, then, analogous to and protected like citizenship? Either it is, or else it must be analogous to alienage, for the constitution with respect to nationality recognizes only the two categories.

The Constitution speaks of "citizens" and "natural born citizens" of the United States in Article I and Article II, and of "citizens or subjects" of foreign states in Article III. Before the passage of the Fourteenth Amendment it contained no definition of citizen. The Fourteenth Amendment says in its opening sentence, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The term "national" does not appear anywhere in the Constitution of the United States.

Because of this particularity in the language of the Constitution, any status recognized by the law, other

than that of citizenship or alienage, must be assimilated to citizenship or alienage if it is to comport with the Constitution. Distinctions may be made among citizens, and also among aliens, but any classes or subclasses into which citizens or aliens may be divided may not combine the two major and mutually exclusive classes recognized by the Constitution. Unless this is so, the words of the Constitution are meaningless. An alien has been defined by this court in *Low Wah Suey v. Backus*, 225 U.S. 460, 473, as:

“One born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws.”

The essence of this definition is birth outside of the jurisdiction of the United States. This is the characteristic which distinguishes the alien and sets him apart in a class different from the citizen and national. Appellant having been born under the jurisdiction of the United States, lacked this essential characteristic of alienage. On the other hand, he was endowed with the positive essential characteristic of citizenship, to-wit: *birth within the jurisdiction of the United States*.

Next to birth, the all-important requirement and characteristic of citizenship is allegiance and fealty to the government. And this, too, is a concomitant of nationality. Speaking of persons born in the Philippine Islands, this court said in *Toyota v. United States* (*supra*, 1940):

“The citizens of the Philippines are not aliens. See *Gonzales v. Williams*, 192 U.S. 1, 13. They owe no allegiance to any foreign government.”

In the earlier case of *Fourteen Diamond Rings v. Unit-*

ed States, 183 U.S. 176, this court in referring to the Philippine Islands, said, "Their allegiance became due to the United States and they became entitled to its protection" (p. 179).

In the Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. 501 (b), adopted after the Philippine Independence Act, congress equated nationals with citizens:

"The term 'national of the United States' means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. *It does not include an alien.*" (Emphasis supplied)

This concept, expressed in the 1940 Act was carried forward in the present 1952 law. Section 101(a)(3) of the Act, 8 U.S.C.A. 1101(a)(3), defines an alien to be

"Any person not a citizen of the United States." and it defines a national of the United States (Section 101(a)(22) 8 U.S.C.A. 1101(a)(22)) as:

"(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

As part of his allegiance, a national is subject to the duty of bearing arms and giving his life, if need be, in defense of this country. This appellant and all native born Filipinos in this country have been subject to that duty and obligation *equally with all citizens*.

Thus, by the similarity of birth under United States jurisdiction; by the similarity of like allegiance to this country; by the similarity of like obligation to serve, defend and safeguard this country; by the similarity of the like protection due to them from this country,

nationals have been equated with citizens. On the other hand, in no significant characteristic can they be equated with aliens. In fact, in every decision of this Court, where the character of nationality had been discussed, the Court was sharp to point out that nationality cannot be equated with alienage. *Gonzales v. Williams, supra; Toyota v. United States, supra.*

It must therefore follow, that nationality, like citizenship, may not be lost, divested, forfeited or impaired without a voluntary act of renunciation or abandonment. Appellant, therefore, is still a national.

Assuming, however, that power to expatriate nationals resides in Congress, it is not seriously contended that Congress has so acted with reference to Filipinos residing in this country prior to the adoption of the Independence Act of 1934. This was admitted by the court in the *Cabebe* case (*supra*) when it held a loss of nationality had taken place. The Court said:

“The question is not directly answered but, as we think, it was inferentially answered) * * * *there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the Islands on the date of their independence.*” (p. 801)

The Court there relied upon various acts of Congress from which it drew an inference that Congress must have intended to denationalize Filipinos residing in the United States.

Respondent's nationality, with which he was born, and which he has at all times maintained by unequivocal acts, may not be taken away by inference. See, *Mandoli v. Acheson*, 344 U.S. 133. In upholding United

States nationality in *Perkins v. Elg*, 307 U. S. 325, 337, this Court said:

“If the abrogation of that right [to elect nationality] had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity.”

The Court has never been unmindful that the law abhors forfeitures and will favor that construction of a statute which avoids such result. *Washington Pub. Co. v. Pearson*, 306 U.S. 30, 41; *United States v. One Ford Coach*, 307 U.S. 219, 226; *Knickerbocker Life v. Norton*, 96 U.S. 234, 242. Expatriation of respondent is a forfeiture of the nationality he obtained by birth—a forfeiture which deprives him of “all that makes life worth living.” In a case involving the construction of a deportation statute, the Court said:

“We resolve the doubts in favor of that construction [avoiding deportation] because deportation is a drastic measure and at times the equivalent of banishment or exile, * * * It is the forfeiture * * * of a residence in this country. Such a forfeiture is a penalty * * * since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.”

Fong Haw Tan v. Phelan, 333 U.S. 6, 10.

If resulting deportation evoked such concern from the Court because it is a forfeiture of residence in the United States, how much more should the Courts be concerned where an implied construction is being used to deprive respondent, not only of his residence, but of

his birthright his United States Nationality. See also *Bennett v. Hunter*, 76 U.S. 326, 336.

If this issue were one of contract law and property rights, the change of position incurred by appellant upon the reliance of his United States nationality would remove any question of his right to the protection of this Court. Surely the Constitution of this country gives appellant as much protection as the common law of contracts!

It is further to be noted that nationality, and particularly as relates to retention of one's original nationality, is a matter of intent. Whatever theoretical ties that appellant may have had with the Philippines, as soon as the Treaty of Independence was ratified he unequivocally expressed his intent to remain a national of the United States, and forego any claim of Philippine nationality. Yet the government argues that this nationality, with which appellant was born, may be taken away by inference from a treaty.

Returning to the *Cabebe* case, it is important to call the Court's attention to the fact that while the Court stated the problem as one applying to a person born in the Philippines, and domiciled in the United States, the issue actually before the court involved only a person domiciled in Hawaii. In section 8 of the Independence Act of 1934, 48 Stat. 462, Congress provided that residence in Hawaii was not equivalent to residence in the United States; thus, after 1934, a Filipino could enter the Hawaiian Islands without restriction, but he could not enter the continental United States except as a quota immigrant. It becomes clear, therefore, that

the facts involved in the *Cabebe* case are not in any way decisive of the issue of appellant's nationality, since he actually came to the continental United States for permanent residence in 1930.

For the foregoing reasons, it is respectfully submitted that *Cabebe v. Acheson* (C.A. 9, 1950) 183 F.(2d) 795, is not determinative of appellant's status, and that since appellant has elected to *retain* his United States nationality, Congress, by treaty or otherwise, can not deprive him of that status, without denying him life and liberty without due process of law.

CONCLUSION

For the above reasons it is therefore respectfully submitted that the deportation order herein should be set aside and appellant released from all further custody of appellee.

Respectfully submitted,

C. T. HATTEN,

Attorney for Appellant.

November 17, 1955.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

HENRY RAGONTON RABANG,
Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization
Service,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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OFFICE AND POST OFFICE ADDRESS:
1021 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

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IN THE
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HENRY RAGONTON RABANG,
Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization
Service,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred
by Section 2241, Title 28, U.S.C., and on this Court
by Section 2253, Title 28, U.S.C.

STATUTE INVOLVED

The statute involved is the Act of February 18, 1931, Chapter 224, 46 Stat. 1171, as amended by Section 21, Chapter 439, Title II, Act of June 28, 1940, 54 Stat. 673, former Section 156 (a), Title 8, U.S.C. This statute is set forth in pertinent detail on page 3 of appellant's brief, as well as in appellee's Argument herein.

STATEMENT OF THE CASE

Appellant is a native of the Philippine Islands who has never been naturalized nor otherwise become a citizen of the United States. On February 12, 1951, in the United States District Court, Seattle, Washington, he was convicted on his plea of guilty of the crime of selling and giving away narcotic drugs, in violation of Section 2554 (a), Title 26, U.S.C. He was sentenced to confinement in the King County, Washington, jail for a period of six months on Count One of the Indictment, which sentence was suspended, and he was placed on probation for three years.

The Immigration and Naturalization Service instituted deportation proceedings against the appellant on February 27, 1951, under the Act of February 18, 1931, as amended, on the grounds that on or after June 28, 1940, he had been convicted of the violation

of a law relating to traffic in narcotics, to-wit: sell and give away narcotic drugs in the form of morphine tartrate syrettes (R. 49). The appellant was ordered deported on October 26, 1951, pursuant to the said deportation proceedings, and a subsequent appeal was dismissed by the Board of Immigration Appeals.

The appellant thereafter appealed the deportation order to this court and said appeal was dismissed for lack of prosecution.

On March 1, 1955, the Acting Regional Commissioner, Northwest Region, Immigration and Naturalization Service, moved the Board of Immigration Appeals to reopen and reconsider the order of deportation in view of the decision of the United States Supreme Court in the case of *Barber v. Gonzales*, 347 U.S. 637, 74 S.Ct. 822, 98 L.Ed. 1009, with a view of terminating the proceedings or for such other action as it deemed appropriate (R. 21, 22).

On April 7, 1955, the Board of Immigration Appeals denied the said motion for reconsideration for the reason that the decision in *Barber v. Gonzales*, *supra*, is not applicable to the instant case. (R. 17, 19).

The District Court for the Western District of Washington, Northern Division, denied appellant's petition for Writ of Habeas Corpus, Show Cause, and Declaratory Judgment on July 29, 1955. The court,

in its Findings of Fact and Conclusions of Law, found that appellant had been convicted of the crime of selling and giving away narcotic drugs in violation of Section 2554 (a), Title 26, U.S.C., and that appellant was, at all times therein material, an alien subject to deportation under the above-named statute (R. 100, 101, 102). Appellant has appealed from that order to this court.

QUESTION PRESENTED

Can a native of the Philippine Islands, who came to the United States as a national in 1930 and who has never been naturalized nor otherwise become a citizens of the United States, be deported pursuant to the provisions of former Section 156 (a), Title 8, U.S.C., after having been convicted for violation of a statute prohibiting and regulating the sale or giving away of narcotic drugs?

SUMMARY OF ARGUMENT

Appellant argues that he is not an alien, but that he is a national, having come to the United States as a national in 1930; that his status as a national has not changed notwithstanding the granting of independence to the Philippine Islands in 1946; and that Congress has not the power to deprive him of that status in the absence of a voluntary act of expatriation on his part.

The argument is not novel, and has been rejected in a series of decisions previously determined in this jurisdiction. *Cabebe v. Acheson*, 183 F. 2d 795; *Man-gaoang v. Boyd*, 205 F. 2d 553, (cert. denied 346 U.S. 876); *Gonzales v. Barber*, 207 F. 2d 398, (reversed on other grounds, 347 U.S. 637, 74 S.Ct. 822, 98 L.Ed. 1009); and *United States v. Boyd*, 222 F. 2d 445.

The Government contends that appellant is an alien, subject to the laws of the United States pertaining to aliens, and that as such he is deportable under the provisions of the Act of February 18, 1931, c. 224, 46 Stat. 1171, former Section 156 (a), Title 8, U.S.C., as amended, and that he is deportable under the provisions of that Act regardless of whether or not he has ever made an "entry" into the United States within the meaning of any statute.

Former Section 156 (a), Title 8, U.S.C., the statute herein under consideration, forecloses any argument that an "entry" is a prerequisite to a valid order of deportation, as the statute, unlike prior similar statutes, does not condition the right to deport for conviction of therein enumerated crimes upon "conviction after entry."

ARGUMENT

1. *Is the Appellant an Alien?*

The appellant contends that inasmuch as he is a native of the Philippine Islands and had the status of a national prior to Philippine Independence in 1946, he remains a national of the United States and cannot be deported therefrom as an alien pursuant to United States laws relating to aliens.

The term "nationality" has been defined as denoting a relationship between an individual and a nation involving the duty of obedience or allegiance on the part of the subject and protection on the part of the state. *Cabebe v. Acheson*, 183 F. 2d 795 (C.A. 9, 1950).

On July 4, 1946, the President of the United States proclaimed that the United States "hereby withdraws and surrenders all rights of possession, supervision, jurisdiction, control, or sovereignty now existing and exercised by the United States of America in and over the territory and the people of the Philippines," and that he, for the United States, recognized "the independence of the Philippines as a separate and self-governing nation." *Cabebe v. Acheson, supra*, A treaty to this effect was entered upon with the Republic of the Philippines. *Treaty of July 4, 1946*, effective October 22, 1946, 61 Stat. 1174.

This court commented on the effect of this treaty upon the status of Filipino nationality in the following language:

“The status of United States nationality for Filipinos was the direct result of the United States’ assumption of sovereignty of the Islands. When the United States relinquished its sovereignty, there remained no basis for such status.” *Cabebe v. Acheson*, 183 F. 2d 795, p. 801.

Appellant argues, on page 18 of his brief, that the issue in the *Cabebe* case involved only a person domiciled in Hawaii, and that the facts involved in the *Cabebe* case are not in any way decisive of the issue of appellant’s nationality, since he came to the continental United States for permanent residence in 1930.

This argument is answered squarely in the case of *Mangaoang v. Boyd*, 205 F. 2d 553 (C.A. 9, 1953). In this case appellant, a native of the Philippines, came to the continental United States for permanent residence in 1926, and lived in the United States continuously since that day. The court stated:

“Appellant asserts that he is not now an alien, but that he always has been and remains a national of the United States. It is clear that to maintain this position he must demonstrate that the rule of *Cabebe v. Acheson*, *supra*, does not apply to him. In that case this court held that upon proclamation of Philippine Independence on July 4, 1946, Filipino nationals of the United

States lost the status of nationality whether they were then inhabitants of the Islands or domiciled in the United States. We said, 183 F. 2d at page 801: 'The status of the United States nationality for Filipinos was the direct result of the United States' assumption of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status.'

"Appellant argues that since Cabebe was domiciled in Hawaii and not in continental United States, the rule of that case should not be applied to him. Further he challenges the correctness of the decision in the Cabebe case and seeks to have us re-examine it. We think that it was rightly decided and that under its rule the appellant became an alien on July 4, 1946."

It may be well to note that appellant prevailed upon appeal in the *Mangaoang* case, *supra*, on other grounds.

The same contention was again ruled on contrary to appellant's position in *Gonzales v. Barber*, 207 F. 2d 398 (reversed, 347 U.S. 637 on other grounds). In this case, Gonzales, a native of the Philippine Islands, lawfully came to the continental United States in 1930, and had since resided here. On the question of his status as an alien, the court stated on page 400 of its opinion:

"Gonzales next contends that he is not within the statutory class referred to in the deportation order. He claims that he is not an alien but a national of the United States. This contention is

without merit. Gonzales became an alien on July 4, 1946, upon the proclamation of Philippine Independence. *Mangaoang v. Boyd*, 9 Cir., 205 F. 2d 553; *Cabebe v. Acheson*, 9 Cir., 183 F. 2d 795."

Appellant's contention that Congress cannot declare a loss of nationality is likewise without merit. *United States v. Wong Kim Ark*, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890, cited by appellant in support of the contention, involves the power of naturalization and the power to confer citizenship. Appellant has never been naturalized or otherwise become a citizen, and the case cited is not in point.

It is the government's position that, as demonstrated by the cases cited above, this is simply another case involving the same question of law, and substantially the same facts, as cases already decided by this court contrary to appellant's contention that he is not an alien, and that the rule announced in those cases is determinative of the issue in the instant case. Appellant is clearly an alien within the meaning of the Act of February 18, 1931, as amended.

II. "Entry" Is Not a Prerequisite to Deportation Under the Act of February 18, 1931, as Amended.

Appellant's second Specification of Error states, in effect, that appellant cannot lawfully be deported because, having been at the time of his arrival, a na-

tional, he never "entered" the United States. The fallacy of this argument becomes apparent when the appellant's purported authorities in support of the argument are considered.

Barber v. Gonzales, 347 U.S. 637, 74, S.Ct. 822, 98 L.Ed. 1009, and *Del Guerico v. Gabot*, 161 F. 2d 559 (C.A. 9, 1947), are both cases involving deportation proceedings under former Section 155 (a), Title 8, U.S.C., Section 19 of the Immigration Act of 1917. That statute provided, in part:

" * * * except as hereinafter provided, any alien * * * who after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States * * *" shall be deported.

As is evident, the statute, by its own language, conditions deportation upon conviction of a crime "committed within five years after the entry of the alien to the United States."

For purposes of comparison, the pertinent provisions of the Act under which the Government seeks to have the appellant deported is set forth:

"Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this section) who, after February 18, 1931, shall be convicted for violation of or con-

spiracy to violate any statute of the United States or of any State, Territory, possession, or of the District of Columbia taxing, prohibiting, or regulating the manufacture, production, compounding transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in sections 155 and 156 of this title. Feb. 18, 1931, c. 224, 46 Stat. 1171; June 28, 1940, c. 439, Title II, §21, 54 Stat. 673." Former Section 156a, Title 8, U.S.C.

Both the *Gonzales* and the *Del Guerico* cases, *supra*, are authority for the proposition that lawful deportation is conditioned upon conviction of a crime after "entry," because the statute involved in those cases so *provided*.

In the instant case, however, the appellant has been ordered deported pursuant to the Act of February 18, 1931, *supra*, which Act does not condition deportation upon conviction of a crime after "entry." It simply requires that the person sought to be deported be an alien, and that he be, or have been, convicted for violation of any law regulating traffic in narcotics after the effective date of the enactment. The appellant in this case was so convicted twenty years after the enactment of the Act under which he is sought to be deported, and he was an alien at the time of such conviction and at a time when the said Act

was effective, having been an alien for all purposes since July 4, 1946.

The language of the Act is too clear and unambiguous to permit any other conclusion than that appellant, as an alien, is subject to deportation under its terms.

Appellant's third Specification of Error relates to alleged error on the part of the District Court in concluding that nationality can be divested in the absence of a voluntary act of expatriation. The argument assumes a fact not in existence, that appellant is a "national." This argument has been answered in Part I of appellee's Argument, and we will not reiterate it here. However, it should be pointed out that the court's ruling does not relate to *divestiture* of nationality; it simply holds that appellant is an alien, subject to deportation under the provisions of former Section 156 (a), Title 8, U.S.C. (R. 100).

CONCLUSION

For the above reasons it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

RICHARD F. BROZ
Assistant United States Attorney

December 30, 1955.

No.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

HOLLYWOOD PREMIERE, a corporation,
Bankrupt.

JOSEPH S. HERBERT & Co., a copartnership,
Appellant.

vs.

J. H. MAGID, Superseded Assignee for the Benefit of
Creditors,
Appellee.

APPELLANT'S BRIEF.

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I.

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vs.

J. H. MAGID, Superseded Assignee for the Benefit of
Creditors,
Appellee.

APPELLANT'S BRIEF.

*To the Honorable, the United States Court of Appeals for
the Ninth Circuit, and to the Honorable Chief Justice
and Associate Justices Thereof:*

The Petitioner, Joseph S. Herbert & Co., presents this
its Appellant's Brief, and respectfully represents:

Statement of Facts Disclosing Basis for Jurisdiction.

This Appeal is before this Honorable Court upon an
Order of this Honorable Court granting Appellant leave
to appeal from an Order, made on or about March 15,

1955, of the United States District Court for the Southern District of California, Central Division, the Honorable Leon R. Yankwich, Judge thereof, affirming an Order of the Referee in Bankruptcy, the Honorable Reuben G. Hunt, made on August 2, 1954, in the above entitled cause made upon the Petition filed In the Matter of Hollywood Premiere, a Bankrupt, by J. H. Magid, a Superseded Assignee for the Benefit of Creditors, overruling the objection of Appellant to the summary jurisdiction of the Referee and ordering Appellant to pay to the Trustee in Bankruptcy herein the sum of Four Hundred Six and 21/100 Dollars (\$406.21), and adopting the findings of the Referee as the findings of the Court.

The statutory authority for the jurisdiction of this Court is set forth in Section 24(a) of the Bankruptcy Act as amended (11 U. S. C. A., Sec. 47(a)).

Statement of the Case.

Involuntary Bankruptcy Proceedings in the matter of Hollywood Premiere, a corporation, Bankrupt, were commenced in the District Court of the United States for the Southern District of California, Central Division, on October 7, 1952. An adjudication was had on October 27, 1952, and E. A. Lynch was duly and regularly elected, appointed and qualified as Trustee in Bankruptcy on November 25, 1952. [Tr. of Rec. p. 1, lines 1-13.]

Prior thereto, on June 28, 1952, the Appellee, J. H. Magid, became the common law Assignee for the Benefit of Creditors of the said Hollywood Premiere, not then a Bankrupt. (*Brainard v. Fitzgerald*, 3 Cal. 2d 157, 44 P. 2d 336 (1935).) [Tr. of Rec. p. 1, lines 14-16.] Magid thereupon commenced to act as Assignee.

On July 1, 1952, the Assignee (now the Appellee) employed the Appellant, Joseph S. Herbert & Co., a co-partnership of Certified Public Accountants, to make an independent audit of the books and records of the Assignor, Hollywood Premiere. The services of Appellant were completed on or about July 30, 1952, and its statement for professional services rendered was delivered to the Assignee on or about July 31, 1952. Pursuant thereto, the Appellant was paid by said Assignee, prior to the filing of the Involuntary Petition in Bankruptcy of the Assignee's Assignor, the sum of One Thousand Eight Hundred Fifty and 66/100 Dollars (\$1,850.66).

On June 4, 1953, Assignee filed his Report and Account. On September 28, 1953, the Trustee filed his "Petition for Hearing to Consider the Assignee's Report and Account." [Tr. of Rec. p. 1, lines 23-26.] The Assignee subsequently filed his "Answer" to the Trustee's request for details as to certain expenses. [Tr. of Rec. p. 2, lines 2-5.] On December 4, 1953, on a hearing of the Assignee's account, the Honorable Reuben G. Hunt presiding, in the above entitled Bankruptcy, the Referee surcharged the Assignee in the sum of Eight Hundred Forty-six and 22/100 Dollars (\$846.22) for payment of expenses to certain parties, including the sum of Four Hundred Six and 21/100 Dollars (\$406.21) paid to Appellant prior to the Bankruptcy of said Hollywood Premiere for the aforesaid services rendered by and paid for to Appellant prior to Bankruptcy. Appellant was not a party to that proceeding. [Tr. of Rec. p. 7, line 9, to p. 8, line 26; p. 14, lines 12-25; p. 13, lines 1-21; p. 17, lines 15-20; p. 18, line 12.]

The disputes now before this Court commenced on January 3, 1954, when Appellee filed his "Petition *re*

Accountant's Fee" in the Bankruptcy Proceeding, and before the same Referee, for an Order directing Appellant to repay this Estate the said sum of Four Hundred Six and 21/100 Dollars (\$406.21) for which said Assignee had been surcharged. [Tr. of Rec. pp. 19-20.] An Order to Show Cause was issued by the said and same Referee in Bankruptcy on January 4, 1954, ordering Appellant to show cause why the Appellee's Petition should not be granted. [Tr. of Rec. pp. 21-22.]

Appellant filed and made a special appearance objecting to the jurisdiction, summary and otherwise, of the Court to hear and determine Appellee's Petition. [Tr. of Rec. pp. 23-25.] A hearing was had on the objections of Appellant to and the issue of jurisdiction was heard on January 12, 1954, before the Honorable Reuben G. Hunt (the same Referee who surcharged the Assignee). By his "Memorandum Opinion and Order" dated February 1, 1954, the Referee overruled the objections of Appellant to the Court's and Referee's jurisdiction and gave Appellant time to answer on the merits. [Tr. of Rec. pp. 26-29.] A hearing on the merits was had on April 22, 1953, at which time the objections to jurisdiction were again made by Appellant and again denied. Upon evidence being received on the merits the Referee again overruled the objection of Appellant to the jurisdiction, summary or otherwise, of the said Court and ordered the preparation of Findings of Fact and Conclusions of Law, which he signed on August 2, 1954, against Appellant and in favor of the Trustee in Bankruptcy, E. A. Lynch,

in the sum of Four Hundred Six and 21/100 Dollars (\$406.21). [Tr. of Rec. pp. 30-35.]

On August 13, 1954, Appellant filed his Petition for Review of said Order. [Tr. of Rec. pp. 36-41.] The "Certificate on Review of the Referee's Orders relating to a refund to J. H. Magid, Assignee for the Benefit of Creditors, of money held excessively paid by the Assignee to Joseph S. Herbert & Co., Certified Public Accountants," was filed on August 16, 1954. [Tr. of Rec. pp. 42-45.]

The Petition for Review came on for hearing before the Honorable Leon R. Yankwich, Judge of the District Court of United States, Southern District of California, on the 14th day of March, 1955. The Court adopted the Findings of Fact and Conclusions of Law and affirmed the Order of the Referee against Appellant. [Tr. of Rec. pp. 68-69.]

Thereafter, Appellant petitioned this Honorable Court for leave to appeal from said Order of the said District Court affirming the Order of the Referee. A transcript of the record of the above entitled matter and a brief in support of the said Petition were filed with this Honorable Court, and are incorporated herein as though set forth in full. After due notice and oral argument in support of the said Petition, this Honorable Court made its Order granting Appellant leave to appeal from the said Order of the District Court affirming the Order of the Referee in Bankruptcy in the above entitled cause as aforesaid. This brief is filed in support of said appeal.

Specification of Error Relied Upon by Appellant.

Neither the District Court of the United States for the Southern District of California, in Bankruptcy, nor the Referee in Bankruptcy thereof had any jurisdiction, summary or otherwise:

(1) Over the subject matter of a Petition filed in a Bankruptcy proceeding of his Assignor by a Superseded Assignee for the Benefit of Creditors to recover moneys from persons who contracted with and received payment from said Assignee prior to the institution of any Bankruptcy proceedings against said Assignee's Assignor; or

(2) Over a Third Person (Appellant) with whom the Assignee had prior to the institution of Bankruptcy proceedings contracted with and to whom said Assignee made payment for said services, said services having been performed and paid for prior to the institution by the Assignor of Bankruptcy proceedings, under a Petition filed by the Assignee in the Bankruptcy proceeding of the Assignor seeking to recover for the Assignor's Bankrupt Estate a portion of the moneys so paid by the Assignee as allegedly in excess of the reasonable value of the services performed, the payment having been in accordance with the Contract between the Assignee and said Third Person.

Therefore, the Orders of the District Court and of its Referee in Bankruptcy are contrary to law and should be reversed.

POINTS AND AUTHORITIES.

I.

Neither the District Court of the United States Sitting in Bankruptcy nor Its Referee in Bankruptcy Has Any Jurisdiction (Summary or Otherwise): (1) Over the Subject Matter of a Petition, Filed in a Bankruptcy Proceeding of His Assignor, by a Superseded Assignee for the Benefit of Creditors to Recover Moneys From Persons Who Contracted With and Received Payments From Said Assignee Prior to the Institution of the Bankruptcy Proceeding Against the Assignee's Assignor, or (2) Over the Third Person (Appellant) With Whom the Assignee Had, Prior to the Institution of the Bankruptcy Proceeding, Contracted and to Whom Said Assignee Made Payment for Services Performed and Paid for Prior to the Institution of the Bankruptcy Proceedings of the Assignor Under a Petition Seeking to Recover for the Assignor's Bankrupt Estate a portion of the Moneys so Paid by the Assignee as Allegedly in Excess of the Reasonable Value of the Services Performed, the Payment Being in Accordance With the Contract Between the Assignee and Said Third Person.

In re Prima Co., 98 F. 2d 952 (C. C. A. 7, 1938);
Chicago Bank of Commerce v. Carter, 61 F. 2d 986;

Jenkinson v. The First National Bank of Sheldon, Iowa, 295 Fed. 778 (C. C. A. 8, 1924);

Evarts v. Eloy Gin Corp., 204 F. 2d 712 (C. C. A. 9, 1953);

Nixon v. Michaels, 38 F. 2d 420 (C. C. A. 8, 1930);

Rodgers v. Chickamauga Trust Co., 253 Fed. 541 (C. C. A. 5, 1918);

- In re Finlay*, 104 Fed. 675 (S. D. N. Y., 1900);
In re Pyrocolor Corp., 46 F. 2d 554 (S. D. N. Y., 1930);
Shor v. McGregor, 108 F. 2d 421, 423-424 (C. C. A. 5, 1939);
Bankruptcy Act, Sec. 2(a)(3) (11 U. S. C. A., Sec. 11(a)(8));
Bankruptcy Act, Sec. 2(a)(21) (11 U. S. C. A., Sec. 11(a)(21));
Bankruptcy Act, Sec. 60(a)(1) (11 U. S. C. A., Sec. 96(a)(1));
Bankruptcy Act, Sec. 70(a)(8) (11 U. S. C. A., Sec. 11(a)(8));
Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975 (C. C. A. 8, 1915);
Bankruptcy Act, Sec. 23(a), (b) (11 U. S. C. A., Sec. 46(a)(b));
Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.04, pp. 450-453;
Duda v. Sterling Mfg. Co., 178 F. 2d 428 (C. C. A. 8, 1949);
In re Italian Cook Oil Corp., 91 Fed. Supp. 72 (D. M. J., 1950);
In re Roman, 23 F. 2d 556 (C. C. A. 2, 1928);
Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.05, p. 481, Note 27;
Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.06(9), pp. 502-503;
Cal. Civ. Code, Sec. 2319, par. 1;
Cal. Civ. Code, Sec. 2330;
Cal. Civ. Code, Sec. 2342;
Cal. Civ. Code, Sec. 2343, subd. 1.

1. The *Bankruptcy Act* defines and limits the authority of the Bankruptcy Courts. The Bankruptcy Courts are of statutory authority. Bankruptcy Courts must find their jurisdiction and powers in the express language of or by implication from the Bankruptcy Act.

In re Prima Co., 98 F. 2d 952 (C. C. A. 7, 1938);
Chicago Bank of Commerce v. Carter, 61 F. 2d 986
(C. C. A. 8, 1932) (rehear. den. 1932);

Taubel-Scott-Kitsmiller Co. v. Fox, 264 U. S. 426,
431, 44 S. Ct. 396, 68 L. Ed. 770 (1924);

In re Kessler, 90 Fed. Supp. 1012, 1015 (S. D.
Calif., 1950);

Kaplan v. Guttman, 217 F. 2d 481 (C. C. A. 9,
1954).

2. If the bankrupt itself had made the payment to the Accountant (Appellant) for the services rendered, and even if it were claimed that such payment was either a preference or a fraudulent transfer, neither the District Court nor the Referee in Bankruptcy thereof would have had or does have summary jurisdiction to recover such preference or the amount of such claimed fraudulent transfer.

Bankruptcy Act, Sec. 60(a)(1), (b) (11 U. S. C.
A., Sec. 96(a)(1), (b));

Bankruptcy Act, Sec. 67(d) (11 U. S. C. A., Sec.
107(d));

In re Roman, 23 F. 2d 556 (C. C. A. 2, 1928);

Duda v. Sterling Mfg. Co., 178 F. 2d 428 (C. C.
A. 8, 1949);

In re Italian Cook Oil Corp., 91 Fed. Supp. 72
(D. N. J., 1950);

Collier on Bankruptcy (14th Ed.), Vol. 2, Sec.
23.06 (9), pp. 502-503.

3. If any payment by the Assignee to the Accountant (Appellant) with whom he contracted for services and to whom he paid the sum involved for such services, all prior to the institution of the bankruptcy proceedings against his Assignor, was recoverable under any circumstances in behalf of the bankruptcy estate, the sole right to institute or prosecute any proceedings therefor was under any circumstances vested in the receiver or trustee of said bankrupt estate and not in the superseded assignee.

Bankruptcy Act, Sec. 23 (11 U. S. C. A., Sec. 46);

Bankruptcy Act, Sec. 2(a)(3) (11 U. S. C. A., Sec. 11(11)(3));

Bankruptcy Act, Sec. 60(b) (11 U. S. C. A., Sec. 96(B));

Bankruptcy Act, Sec. 11(b), (c), (e) (11 U. S. C. A., Sec. 29(b)(c)(e)).

a. The Superseded Assignee was not a party to and had no right to file any Petitions in the Bankruptcy proceedings of his Assignor to determine any controversies between himself and Third Persons, and neither the District Court nor its Referee in Bankruptcy had any jurisdiction of or over the Petition filed by such Superseded Assignee in the bankruptcy proceedings of his Assignor to determine his rights as against or to recover any moneys from a Third Person also not a party to such Bankruptcy proceedings, to wit, the Accountant (Appellant) with whom said Assignee had contracted.

Evarts v. Eloy Gin Corp., 204 F. 2d 712 (C. C. A. 9, 1953);

Nixon v. Michael, 38 F. 2d 420 (C. C. A. 8, 1930);

Rodgers v. Chickamauga Trust Co., 253 Fed. 541 (C. C. A. 5, 1918).

4. Section 2 of the Bankruptcy Act confers jurisdiction upon the courts of the United States sitting in bankruptcy to and only to, with reference to a superseded assignment within four months prior to the date of the bankruptcy, "Require * * * assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property *to deliver the property in their possession or under their control* to the receiver or trustee appointed under this Act * * * and * * * to account to the court for the disposition by them of the property of such bankrupt * * *. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by such * * * assignee * * * either to himself or to others for services and expenses under such * * * assignment * * * and shall, unless such disbursements have been approved upon notice to creditors and other parties in interest by a court of competent jurisdiction prior to the proceeding under this Act, *surcharge such* * * * assignee * * * the amount of any disbursements determined by the court to have been improper or excessive."

Section 70(a)(8) of the Bankruptcy Act does not confer jurisdiction nor expand jurisdiction granted by Section 2(a)(21) thereof, but merely, pursuant thereto, confirms the title of the trustee of the Bankrupt to "*property held by an assignee* for the benefit of creditors appointed under an assignment which constitutes an act of Bankruptcy,

which property shall for the purposes of this Act be deemed to be held by the assignee as the agent of the Bankrupt and shall be subject to the summary jurisdiction of the court." It is only the "*property held by an Assignee*" which is deemed to be held by the Assignee as the agent of the Bankrupt. If a chose in action, a cause of action, exists, it would vest in the trustee, and the trustee could only maintain a plenary action therefor. (Emphasis ours.)

In re Standard Gas and Electric Co., 119 F. 2d 658 (C. C. A. 3, 1941);

Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.05, pp. 480-481;

Harrigan v. Bergdoll, 270 U. S. 560 (1926);

Shor v. McGregor, 108 F. 2d 421, 423-424 (C. C. A. 5, 1939).

a. The Bankruptcy Act, Section 70(a)(8), 11 U. S. C. A., Section 110(a)(8), provides for summary jurisdiction of the Bankruptcy Court to recover property held by the Assignee for the Benefit of Creditors as of the date of the filing of the Petition in Bankruptcy. The Referee in Bankruptcy starting with the premise that the Bankruptcy Court had summary jurisdiction to recover property transferred *after* the date of the Bankruptcy by the Bankrupt without Court authority [Tr. of Rec. p. 28, lines 19-22], then *erroneously assumed* that the Bankruptcy Court therefore had summary jurisdiction to recover property paid before the Bankruptcy without the *approval* of the Bankruptcy Court and therefore the Assignee could file Petitions in the Bankruptcy Proceedings of his Assignor. This is tantamount to saying that the Superseded Assignee for the Benefit of Creditors may,

in the Bankruptcy Court, institute actions by filing Petitions against any persons with whom he dealt during the period of his assignment prior to the Petition for Bankruptcy. In other words, employees such as janitors or secretaries who might perform services for the Assignee as such may discover that they must respond in damages to pay what may be alleged to be excessive remuneration and find that they are limited to a hearing before the Bankruptcy Court. Similarly, suppliers of materials, stationery or other supplies, who receive payment currently with the supplying of the said materials, stationery or supplies, may subsequently find themselves defending in the Bankruptcy Court an action for the recovery of all or part of the sums paid to them when they had contracted with the Assignee for the Benefit of Creditors and delivered such materials, stationery or supplies and received payment pursuant to such contract. No statutory authority supports that result nor the result which the Referee in Bankruptcy and the Court below reached in this case.

The Honorable Judge below, on the other hand, sought to find the authority for the summary jurisdiction here in the case of *In re Rand Mining Co.*, 71 Fed. Supp. 724 (S. D. Calif. 1947). *Rand* concerned, however, the effect of Section 67(a)(1) of the Bankruptcy Act, 11 U. S. C. A., Section 107(a)(1), which involved the invalidity of an attachment lien and the right of the Bankruptcy Court to proceed by summary jurisdiction to hear and determine the rights of any parties under the said attachment lien, which summary jurisdiction is expressly referred by *Bankruptcy Act*, Section 67(a)(4), 11 U. S. C. A., Section 107(a)(4).

And even in the *Rand* case the Referee in Bankruptcy acted upon the Petition of the Trustee in Bankruptcy as

is required by Section 67(a)(4). Thus the reach of Section 67(a)(4) does not extend beyond the provisions of Section 67(a) with reference to liens and furthermore does not provide for affirmative relief to one other than the Trustee or the debtor.

The Honorable Judge below, reading pertinent parts of *Rand* into the record [Rep. Tr. p. 6, lines 7-26; pp. 8-10, lines 1-10], failed to understand that in the case now before this Court the claim was by the Superseded Assignee for the Benefit of Creditors. It was not a "claim for expenses which had to be approved before any was due" as the Honorable Court below stated [Rep. Tr. p. 10, lines 2-3]; neither the *Rand* case nor the analogy of the Honorable Court below supports the conclusion reached by that Court.

The limitation of Section 67 of the Bankruptcy Act, which recognized the exercise of summary jurisdiction with respect to voidable liens, was established in a case following *Rand* and which distinguished it. In *City and County of Denver v. Warner*, 169 F. 2d 508 (C. C. A., 10, 1948), the Court stated that although the 1938 amendment to the Bankruptcy Act treated taxes as statutory liens under Section 67 of the Bankruptcy Act, it significantly omitted to grant summary jurisdiction to determine questions arising as to the amount and legality of taxes owing to the United States, or to any State or subdivision thereof, under Section 64, subsection (a) of the Bankruptcy Act. Therefore, the Bankruptcy Court had no summary jurisdiction and could not acquire summary jurisdiction by ordering property taken pending decision on the question of its jurisdiction. Having wrongfully taken possession of the property it was ordered to be surrendered to the adverse claimant.

So also in this case, no statutory authority existing for summary jurisdiction, the Court cannot find its summary jurisdiction in the order of the Court surcharging the Assignee. (*Bankruptcy Act*. Sec. 2(a)(21), 11 U. S. C. A. Sec. 11(a)(21).)

The distinction between the jurisdiction over the Superseded Assignee and over the Third Persons was characterized in *In re McCrum*, 214 Fed. 207, 209 (C. C. A., 2, 1941):

“A trustee in bankruptcy, who has been appointed within four months of the general assignment made by a debtor for the benefit of his creditors, has a right to obtain an order from the bankruptcy court, and in a summary proceeding, compelling the assignee to submit his accounts and to turn over to him all money and property in his hands, which belong to his assignor. No plenary suit is necessary in a case of that sort. The assignee under such conditions is not an adverse claimant, but merely the agent of the assignor for the distribution of the proceeds of the property, and as such agent, his possession is that of the principal. He is a mere naked bailee for the creditors and has no right to retain the possession as against the trustee in bankruptcy.”

The description of the scope of the summary jurisdiction as outlined in the *McCrum* case evidences the limitation of that jurisdiction. The key phrases in the foregoing opinion are “money and property in his hands” and “the Assignee under such conditions is not an adverse claimant.” Therefore, in order for the summary jurisdiction to be exercised as against the Assignee for the Benefit of Creditors, the property must be in the hands of the Assignee at the time of the filing of the Petition and the respondent must not be in the position of an

adverse claimant or a third person stranger to the Bankruptcy.

Here, the funds were not in the hands of the Assignee for the Benefit of Creditors but, prior to the Bankruptcy, had already been paid to the Appellant in payment of its services. Appellant does not hold this money as an agent for either the Bankrupt, the Assignee for the Benefit of Creditors or for any other person connected with the Bankrupt of his Estate. The amendment of 1938 to the Act of Section 2(a)(21) provides for surcharging a Superseded Assignee who fails to account for disbursements for fees or expenses from the Bankrupt's Estate prior to the date of Bankruptcy. The filing of the Bankruptcy petition within four months thereby rendered nugatory, as of that time, the assignment for the benefit of creditors. The property at that time held by the Assignee is the property of the Bankrupt and is succeeded to by the Trustee. It being therefore the property of the bankrupt estate and the Trustee being entitled to possession, the amendment was designed to avoid a plenary suit against the Assignee or an action on the Assignee's Bond. The Assignee himself, therefore, is charged with notice by the statute that in his transactions he must, in so far as services are rendered for the benefit of the Bankrupt's Estate, protect himself by whatever agreement, if any, he can make with the persons with whom he contracts.

The decision herein will destroy the using of Common-Law Assignments for Benefit of Creditors, for no person—even though no Bankruptcy is pending—will be willing to contract with an Assignee if, notwithstanding such Contract, in the event of a Superseding Bankruptcy, the Bankruptcy Court will have summary jurisdiction to re-evaluate, redetermine, the reasonableness of the Contract

between the Assignee and such Third Person. For example: Assume that an Assignee for Benefit of Creditors is operating for purposes of liquidation a business. He needs steel, services of various persons, merchandise, the rental or use of equipment and everything else which is required to operate and liquidate the business. No merchant, no manufacturer, no person performing services, no purveyor could, in an arm's-length transaction, contract with the Assignee, for he would always be subject to the second guessing of the Referee. The manufacturer wants a certain price for his merchandise which the Assignee needs; the Assignee can buy it no cheaper, and the Assignee in good faith contracts for and pays for the merchandise, but the Referee, second guessing and disagreeing with the Assignee, and believing that the merchant is getting too high a price for his merchandise, would then seek to recover from the merchant the portion which the Referee believes to be improper or excessive, and this notwithstanding the bona fide arm's-length negotiations and Contract between the Assignee and the Third Person.

If an Assignee in bad faith makes expenditures, pays improper, excessive amounts, he should be liable and he should be surcharged therefor, but if the Assignee in good faith and in the exercise of reasonable care enters into a Contract, then he should not be subject to the second guessing, the soothsaying, the economic opinions, of the Referee. Under no circumstances has the Bankruptcy Act conferred jurisdiction on the Referee to recover summarily from the supplier, the merchant, the manufacturer, who in good faith entered into the Contract with the Assignee, the amount received which the Referee believes to be excessive notwithstanding the Contract.

The procedure followed, if it is to be the pattern for such proceedings is akin to a "Kangaroo Court"; the Referee having first surcharged the Assignee as having paid—though in good faith—too high a price to John Doe for his services or his merchandise, then summarily cites before him John Doe to show cause why he should not repay to the Bankrupt Estate the same amount which the Referee has already adjudged, in a proceeding to which John Doe was not a party, was excessive. It is humanly impossible for John Doe to receive the type of hearing which due process entitles him to, for the very Referee who is going to hear the matter summarily has already adjudged that he (John Doe) charged too much for his services or materials, as the case may be.

In the Matters of Murchison and White, 349 U. S. 133, 99 L. Ed. Adv. 551, 75 S. Ct. 623 (1955).

This Court can take judicial notice of the fact that there are more Arrangements and Compositions and Extensions with Creditors handled outside of the Bankruptcy Court throughout our United States than are handled through the Bankruptcy Courts, for it is believed by creditors generally that the costs of handling of non-judicial Assignments, Extensions and Compositions is less than the costs through bankruptcy proceedings. Assignments for Benefit of Creditors are widely used. In California, the type used is the Common-Law Assignment. [See *Brainard v. Fitzgerald*, 3 Cal. 2d 157, 44 P. 2d 336 (1935).] The Decision herein makes impractical and economically impossible the use thereof.

Here the affirmative relief sought by the Superseded Assignee and ordered by the Referee and approved by the Court below is the repayment of money by the Appellant

on the Petition of the Superseded Assignee. The Assignee has been surcharged for the money, which he presumably is now obligated to pay. The dispute is therefore between the Assignee and the Appellant. A Bankruptcy Court does not have jurisdiction to litigate disputes between persons not party to the Bankruptcy proceedings.

In re Pyrocolor Corp., 46 F. 2d 554 (S. D. N. Y., 1930).

In the *Pyrocolor Corp.* case, the Court held that it had no jurisdiction over a Petition by an attorney who was not a party to the Bankruptcy proceedings to direct the Trustee to pay to him directly sums which would otherwise be paid certain creditors.

The Bankruptcy cannot be used to litigate differences between strangers to the Estate and the Creditors. Thus, by analogy, the Assignee, apparently a debtor to the Estate, cannot litigate his claim against a stranger to the Bankruptcy proceedings. The burden to repay, in so far as the Bankruptcy Court is concerned, is on the Assignee for the Benefit of Creditors. It is beyond the summary jurisdiction of the Bankruptcy Court to award affirmative relief to the Assignee against the adverse claimant.

5. The Bankruptcy Court had no jurisdiction of or over the Petition of the Superseded Assignee and the objection to the jurisdiction of the Bankruptcy Court by the Appellant was not waived by it.

The Appellant has, in his written objections, and orally before the Referee, made timely objection to the jurisdiction of the Referee to hear this matter as a summary proceeding or at all.

These objections appear on the records and transcript before this Court. [Tr. of Rec. pp. 23-25; p. 26, lines

21-24; p. 30, lines 16-20; p. 35, lines 6-7; pp. 36-38; p. 43, lines 16-19.]

The records of the proceedings showing timely objections to jurisdiction is an effective answer to any implication of consent arising from the Appellant's contest of the cause upon the merit.

Stiefel v. 14th Street and Broadway Realty Corp.,
48 F. 2d 1041 (C. C. A. 2, 1931) rehear. den.
(1931).

Conclusion.

The principles involved herein are of great importance not only to and as to the rights of Appellant and all other persons who may contract in good faith with an Assignee for the Benefit of Creditors prior to the filing of any Bankruptcy Petition against his Assignor and not only to the enabling of debtors and creditors to agree through Assignments for Benefit of Creditors as to Extensions or Compositions or otherwise, but as well to the very administration of our Courts of justice. It is the effect of the Decision herein that not only is every Contractee who enters into a Contract either for merchandise or services with an Assignee for Benefit of Creditors unable to know whether his Contract is valid or not, unable to price or value either his merchandise or services, because of the review thereof by a Referee in Bankruptcy in the event of a subsequent adjudication in Bankruptcy of the Assignor, but additionally is subject to the prejudging of his Contract, and the value of his merchandise or his services by the very Referee who already and theretofore had adjudged the validity of his contract and the value of his merchandise or services by the hearing on the petition under which the Assignee is first surcharged. The effect of the Decision of the Lower Court is to impair the valid-

ity of Contracts; the effect of the Decision of the Lower Court is to deny to a person who in good faith contracts with an Assignee the right of trial by jury and the right of trial in the normal processes, as due process is known, before a Judge who has not prejudged the merits of his case before the hearing thereof.

It was never the intent of the Amendment to either Section 2(a)(21) or Section 70(a) to deny or deprive a person contracting in good faith with an Assignee for the Benefit of Creditors of his inherent, his constitutional, rights, his rights of due process.

It is respectfully submitted that the said Orders of the Referee and the United States District Court should be reversed.

Respectfully submitted,

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